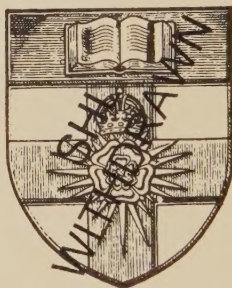


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GEORGE W. KEETON
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GEORG SCHWARZENBERGER

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PREFACE

THIS volume contains the weekly public lectures on Current Legal Problems delivered in the Faculty of Laws at University College, London during the Session 1950-1951, and Sir Cecil Carr's Presidential Address to the Bentham Club.

The contributions on International Law in this volume are meant to be a tribute to Sir Cecil Hurst, formerly Legal Adviser to the Foreign Office and President of the Permanent Court of International Justice, on the occasion of his eightieth birthday. That tribute is readily endorsed by the Faculty of Laws of this College.

Both the contributors and publishers have equally assisted in the speedy publication of this volume. We should like to thank them for this co-operation, and also Mr. J. LL. J. Edwards, the Assistant Editor of this volume, for having read the proofs and for having compiled the Tables of Cases, Statutes and Treaties and the Index.

THE EDITORS

University College, London

April, 1951.

TRENDS IN THE PRACTICE OF THE WORLD COURT

GEORG SCHWARZENBERGER

THE papers on international law in this year's volume of *Current Legal Problems* have a special purpose in common. They are meant to constitute a modest tribute by the international lawyers at University College, London, to Sir Cecil Hurst on the occasion of his eightieth birthday. Each of these papers has as its subject a significant aspect of the work of the Doyen of British international lawyers.

The contributions made by Sir Cecil to the law of diplomatic immunity, to the legal position of the continental shelf and to the constructive treatment of the vexed question of international codification are landmarks in the elucidation of these problems.¹ Yet perhaps of still more lasting value is the less conspicuous work that has been performed by Sir Cecil in his capacity as a member—and, at times, as President and Vice-President—of the Permanent Court of International Justice. In particular, Sir Cecil's Dissenting Opinion in the *Oscar Chinn Case* (1934) will long be remembered. It was a courageous attempt to imbue the World Court with a sense of the need to approach international economic issues in a spirit of fearless realism, to cut through the cloak of formal appearance and to reach the substance of the issue. It appears, therefore, fitting to introduce this small symposium with an examination of some of the trends in the practice of the International Court of Justice, the successor to the rich heritage left behind by the Permanent Court of International Justice.

I. THE COURT'S ENVIRONMENT

Five years may seem too short a span of time to assess trends in any field of international relations. The current of contemporary world affairs flows, however, so swiftly that, even in this short period, the post-1945 world has already been transformed into

¹ Sir Cecil Hurst, *International Law. The Collected Papers*, 1950.

a pre-war era. In the Far East the cycles of peace and war have even succeeded each other. If fate—and the eternal folly of mankind—will it, this interval may even constitute the whole, or the greater part, of the present inter-war period.

However this may be, three features of the international environment have essentially affected the work of the International Court of Justice. They compare unfavourably with the international setting of the Permanent Court of International Justice.

The peace-makers of 1919 achieved at least their primary object. They succeeded in making peace with their major enemies. The peace-makers of 1945 and after have still to agree on the terms which are to be imposed—if this word were still appropriate—on Germany and Japan. Thus, for the time being, these major legal instruments which might have kept the World Court occupied have still to be drafted.

Even in those instances in which the victors managed to agree among themselves and to bring peace treaties into operation—the Peace Treaties of 1947 with Italy and the satellites of the European Axis—the International Court of Justice has not been assigned any judicial function. The victors preferred to the World Court three-men arbitral commissions decidedly inferior in status and, as it proved, utterly ineffective in relation to the Soviet-sponsored ex-enemy States. The victors further showed their reserve towards international arbitration by ignoring the beneficial precedent set in the Peace Treaties of 1919. They chose not to revive the Mixed Arbitral Tribunals for the adjudication of private claims between the subjects of the former belligerents. Instead, they created Conciliation Commissions of a not strictly judicial character.²

² See, for instance, Article 83 of the Peace Treaty with Italy of February 10, 1947 (Cmd. 7481—1948). Still more instructive is the Agreement between the United Kingdom and India, on the one hand, and Siam, on the other, for the Termination of the State of War of January 1, 1946 (Cmd. 8140—1951). It is left to the British Commonwealth—Siamese Committee—to formulate 'the detailed principles required to give effect to the broad policy agreed between the British Commonwealth Governments and the Siamese Government as a basis for the payment of compensation by the latter Government' (Point 3 (a) of the Memorandum enclosed in the Exchange of Notes between His Majesty's Minister at Bangkok and the Siamese Minister for Foreign Affairs, January 6, 1947). Moreover, 'the Committee shall not be bound by strict legal rules of evidence and procedure, but shall be free to aim at equitable and rapid settlement and to establish its own rules to that end' (*ibid.*, under (b)).

Finally, the post-1945 period is characterised by a marked lack of faith, and interest, in international judicial institutions. The overriding East-West rift contributes its full share to an atmosphere in which the always subjective choice between the political or legal character of an international dispute tends to be exercised against it being justiciable. It would, however, be an exaggeration to make this major conflict exclusively responsible for the reserve shown by most members of the United Nations to the judicial settlement of international disputes. Within the Western world, too, there is a remarkable reluctance to submit disputes to international courts and tribunals. Even the specialised agencies of the United Nations, which have been granted the right to ask the International Court of Justice for advisory opinions on matters within their province, show a strange hesitation to make use of this once highly coveted privilege. The combined effect of these trends was to condemn the World Court to relative unemployment.

If it had not been for judgments and advisory opinions arising directly or indirectly out of the Peace Treaties of 1919 to 1923, the record of the Permanent Court of International Justice during the corresponding quinquennium would have been still less impressive than that of the International Court of Justice. Actually not only for five years, but until 1932, it could have devoted the whole of its attention to the perfection of its Statute and Rules of Court. Yet, perhaps, this comparison is unfairly favourable to the new Court. In fact, if not in law, it is a continuation of the old Court. Thus, it might have been expected to reap the fruits of the solid reputation that, over two decades, the Permanent Court of International Justice had built up for itself.³ In the course of five years the International Court of Justice has decided only two contentious cases, the *Corfu Channel Case* (1949) between Albania and the United Kingdom and the *Asylum Case* (1950) between Colombia and Peru. Worse, nothing could illustrate more clearly the deterioration in international standards than the fact that, more than a year after judgment had been passed in the *Corfu Channel Case*, Albania

³ For this reason, Judge Hackworth's comparison of the position of the International Court with that of the United States Supreme Court in the initial stage of its existence shows perhaps excessive optimism ('The Court, its Jurisdiction and Work' in C. Eagleton (ed.), *Annual Review of United Nations Affairs 1949, 1950*, p. 255 *et seq.*).

still refuses to pay the indemnity awarded by the World Court to the United Kingdom.

As for the Court's advisory jurisdiction, the General Assembly of the United Nations gradually overcame its initial inhibitions and enabled the Court to give six advisory opinions.⁴

The somewhat unhealthy preponderance of advisory opinions as compared with contentious litigation is not accidental. Apart from two cases—*Reparation for Injuries Suffered in the Service of the United Nations* (1949) and the *International Status of South-West Africa* (1950)—all the advisory opinions were, in substance, disputes between West and East. They concerned the legal aspects of conflicts of which the non-Soviet majority of the General Assembly felt fairly confident. It would have been impossible to obtain the consent of the Soviet group in the United Nations to the submission of any of these disputes to contentious litigation before the World Court.⁵ Thus, with the growing accentuation of the East-West conflict, the majority of the General Assembly found the Assembly's competence to ask the International Court of Justice for advisory opinions a congenial, if somewhat blunt, weapon in the diplomatic war between the world's two halves.

The few cases pending at present before the World Court⁶ hardly indicate any change in the unfavourable climate of the

⁴ *Conditions of Admission of a State to Membership in the United Nations* (1948); *Reparation for Injuries Suffered in the Service of the United Nations* (1949); *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania* (First and Second Phases—1950); *Competence of Assembly regarding Admission to the United Nations* (1950), and *International Status of South-West Africa* (1950).

Cf. also E. Hambro, 'The Relations between the International Court of Justice and International Organisations' (3 *Western Political Quarterly* (1950), p. 326, at p. 334).

⁵ See further the present writer's 'The Impact of the East-West Rift on International Law' (36 *Transactions of the Grotius Society* for 1950).

⁶ *Anglo-Norwegian Fisheries Case* (Application of September 28, 1949). Even allowing for the complexity of the issue, it is hard to avoid the impression that the Court is unnecessarily spinning out this case (cf. the Court's order of January 10, 1951, *I.C.J. Reports* 1951, p. 9). As it is, the case is not likely to be ready for the oral proceedings before Summer, 1951.

Rights of Nationals of the United States of America in Morocco (Application of October 28, 1950).

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Request for advisory opinion of November 17, 1950).

Haya de la Torre Case (Application of December 13, 1950).

A case between France and the United Kingdom on territorial rights

Court's international environment. It would, therefore, be slightly unrealistic to argue that the World Court was of any major significance in present-day international affairs.

Judging from experience, the facile argument that what matters is the existence of the Court rather than the number of cases decided by it is unconvincing. The proof of this thesis would be the general standard of international law-abidingness, and this is not exactly awe-inspiring. Even the Court's subsidiary function, its contribution to the clarification and development of international law, is necessarily impaired by the scarcity of the necessary raw material.

Nevertheless, the International Court of Justice is the only international judicial institution in the post-1945 period, which has made any contribution worth mentioning to the interpretation and development of international law. Whatever trends can be discerned in the practice of the World Court, therefore, deserve the international lawyer's attention.

2. TRENDS IN THE COURT'S PRACTICE

THE major trends in the practice of the International Court of Justice may be gauged in a number of ways. In a comprehensive analysis, the Court's attitude to the sources and law-determining agencies in the field of international law, especially to the Permanent Court of International Justice, and its reserve—entirely in line with that shown by its predecessor—towards the doctrine of international law would call for consideration. The methods of treaty interpretation adopted by the World Court, and its views on the criteria of international responsibility, would also be helpful for the purpose. Still more relevant, however, is the Court's attitude to the basic structure of international law. It will be possible to deal incidentally, and by way of illustration, with some of the other topics. Yet in a single lecture, discussion must be limited to this central issue: the World Court's attitude to the structure of international law.

In repeated—and somewhat repetitive—separate and dissent-

in two of the minor Channel Islands is on the point of being submitted to the International Court of Justice.

Unfortunately from the point of view of the international lawyer, the promising case between France and Egypt concerning the *Protection of French Nationals and Protected Persons in Egypt* (Application of October 13, 1949) was discontinued by agreement between the parties (Order of March 29, 1950—*I.C.J. Reports 1950*, p. 59). See also *I.C.J. Yearbook 1949-1950*, p. 68.

ing opinions, Judge Alvarez threw out a startling challenge to the World Court. He asked from his colleagues nothing less than to apply a 'new' international law: 'A new conception of law in general, and particularly of international law, has . . . emerged. The traditionally juridical and individualistic conception of law is being progressively superseded by the following conception: in the first place, international law is not strictly juridical; it is also political, economic, social and psychological; hence, all the fundamental elements of traditional individualistic law are profoundly modified, a fact which necessitates their reconstruction. In the next place, strictly individualistic international law is being more and more superseded by what may be termed the law of social interdependence'.⁷ In the view of Judge Alvarez this international law of social interdependence is 'the outcome, not of theory (*spéculation*), but of the realities of international life and of the juridical conscience of the nations'.⁸

It is implied in Judge Alvarez's distinction between the 'old' and his 'new' international law that he accepts as correct the interpretation of classic international law as an individualistic legal system. In any case, it would be hard to deny this character to pre-1914 international law which elevated the independence of States into one of its fundamental legal principles and which was so glaringly subject to the supremacy of the rule of force.⁹

The problem is whether, since 1919 or since the Second World War, 'which opened the greatest period in the history of humanity',¹⁰ any fundamental change in the age-old structure of international law has taken place. Here the ways of Judge Alvarez and of those who interpret the League of Nations and United Nations as systems of power politics in disguise¹¹ must necessarily part. In Judge Alvarez's view we have left behind us the bad old international law of previous periods of power politics and we have entered the age of an international community law.

According to the analysis which underlies this paper, world

⁷ E.g., Individual opinion of Judge Alvarez in the case of *Conditions of Admission of a State to Membership in the United Nations* (1948), *I.C.J. Reports* 1948, p. 69.

⁸ *Ibid.*, p. 69.

⁹ See further the present writer's *Power Politics*, 1951, Chap. 13.

¹⁰ Dissenting opinion of Judge Alvarez in the case of *Competence of Assembly regarding Admission to United Nations* (1950), *I.C.J. Reports* 1950, p. 12.

¹¹ See further *loc. cit.* in note 9 above, Part 2.

power politics continues basically as of old, but has merely been overlaid with a multitude of institutional superstructures. These, in the main, affect only the techniques and ideologies employed by members and non-members of the United Nations alike, but leave the fundamental structure of international society unimpaired. In particular, growing social interdependence in international affairs may be accepted as a fact. From an ethical point of view, however, it is neutral. It may be used equally for good or evil. Moreover, the growing impetus of the law of concentration of political power leads to greater interdependence within each of the world's halves than between the two groups.

Judge Alvarez should not be blamed for his courageous attempt to see international law in a wider perspective. It would be unfair, too, to cover with a conspiracy of silence his constant pleas for a hearing. For this reason, issue must be joined with Judge Alvarez's somewhat peculiar interpretation of the facts of post-1945 international life. It appears to suffer from three minor deficiencies: a debatable historical perspective, a remarkable preoccupation with the ideologies of Lake Success as distinct from the realities of contemporary world politics, and a firm resolve to obliterate the distinction between 'Is' and 'Ought'.

From the legal point of view it might be possible to agree to disagree as to whether, among the blind, Judge Alvarez is the only one to see or, alternatively, whether he is sadly out of touch with reality. It is important for the lawyer to assess properly the social environment of his own legal system. Disagreement on this point need not, however, necessarily affect the interpretation of the law.

Judge Alvarez does not leave matters at that. In his view the International Court of Justice is bound in law to apply this 'new' international law: 'The present Court has a new mission which was not conferred—at least not expressly—on the Court which preceded it. For the Charter of the United Nations has instructed the General Assembly in Article 13 to "encourage the progressive development of international law and its codification". And, with a view to obtaining these results, the Assembly in its Resolution 171 of 1947 expressed the desire that the International Court of Justice should develop this law, in other words, should bring it up to date'.¹²

¹² Individual opinion of Judge Alvarez in the *Corfu Channel Case* (Judgment of April 9, 1949), *I.C.J. Reports* 1949, p. 40.

It is perhaps advisable to recall that Article 13 of the Charter merely 'instructs' the General Assembly of the United Nations to 'initiate studies and to make recommendations' for the purpose, *inter alia*, of encouraging the progressive development of international law and its codification. The decision on any such reports and recommendations still rests, however, with each of the members of the United Nations and, even more so, with any non-member State.

Still less authority for the application of the 'new' international law by the World Court is to be derived from the Resolution of the General Assembly of November 14, 1947. In any case, with exceptions that are irrelevant here, the General Assembly is only authorised to make recommendations, and not any binding decisions. In this particular case the General Assembly limited itself very properly to a recommendation. Its purpose was not, however, to ask the World Court to apply any 'new' international law, but to induce the members and organs of the United Nations, and the specialised agencies, to make greater use of the International Court of Justice.

Only in the preamble of the Resolution is there any remote reference to the subject which Judge Alvarez has so much at heart: 'Considering that it is also of paramount importance that the Court should be utilised to the greatest practicable extent in the progressive development of international law both in regard to legal issues between States and in regard to constitutional interpretation'. This passage is, however, anything but a mandate to the World Court to apply any 'new' international law. Not only would the General Assembly not have any authority to issue such instructions to the World Court. Any attempt in this direction would be contrary to the Charter; for the Statute of the Court is an integral part of the Charter and, in its Article 38, clearly prescribes the rules of international law to be applied by the Court.

In its judgments and advisory opinions, the World Court studiously ignored any direct reference to the 'new' international law. In other ways, however, it made it abundantly clear that it was quite content to apply classic international customary law as modified by relevant bilateral and multilateral treaties.

The attitude of the International Court of Justice towards the structure of international law clearly emerges from its treat-

ment of concrete issues. Discussion must be limited to three representative problems: respect for the independence of States, the Court's interpretation of the scope of its own jurisdiction, and the effects of treaties on third States.

(1) *State Sovereignty.* Perhaps the major reason why the Permanent Court of International Justice inspired as much confidence as it did, was that it firmly resisted the temptation to minimise unduly the key position of the principle of State sovereignty in international law. At the same time, the Permanent Court of International Justice constantly tried to harmonise respect for this principle with the requirement of the effectiveness of international law. It rightly insisted, however, on the production of clear evidence for any alleged limitation of the exercise of unlimited State jurisdiction.¹³ It would be euphemistic to say that the International Court of Justice had already found the golden mean between respect for State sovereignty and the effective application of international law. It still veers dangerously from one to the other extreme.

In the case of the *International Status of South-West Africa* (1950) the World Court rightly sustained the optional, against the compulsory, character of the trusteeship system of the United Nations. It resolved with common sense the doubt arising from the use of the word 'voluntarily' in paragraph 1 (c) of Article 77 of the Charter.

The Court achieved this result by rejecting a solution based on a narrow literal and logical interpretation of the Article (use of *argumentum a contrario*). Instead, it relied on a convincing systematic interpretation of Chapter XII of the Charter as a whole. The World Court held that the use of the term 'voluntarily' in connection with one of the three categories of potential trust territories could not 'override the principle derived from Articles 75, 77 and 79 considered as a whole'.¹⁴

Little doubt exists that this construction is in accordance with the intentions of the Contracting Parties to the Charter. In view of the fact that the systematic interpretation led to a conclusive result, the Court did not consider it necessary to support its interpretation by reference to preparatory material. In taking

¹³ See further the present writer's *International Law*, Vol. 1, 1949, p. 53 *et seq.*, and p. 208 *et seq.*

¹⁴ *I.C.J. Reports 1950*, p. 139.

argt this view of the hierarchy between the various methods of treaty interpretation, the International Court of Justice followed in the footsteps of its predecessor.¹⁵ Yet any historical interpretation of the text would have only supported the conclusion reached by the World Court.¹⁶

Just as, in this case, the International Court refused to transform permissive into compulsory rules, it firmly rejected any attempt to read into the negative formulation of Article 80 of the Charter any positive duty to negotiate and conclude trusteeship agreements: 'Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms'.¹⁷ So far, the advisory opinion kept within the limits of sound treaty interpretation, and the World Court gave accurate expression to the intentions of the Contracting Parties to the Charter of the United Nations.

The International Court of Justice perhaps overstepped the border line between *lex lata* and *lex ferenda* when it substituted for the Council of the League of Nations the General Assembly of the United Nations as the supervisory organ regarding the only League mandate still in existence. The competence of the General Assembly under Article 10 of the Charter is a somewhat weak foundation for any claim to the exercise of supervisory functions.¹⁸ Discussion and supervision are not the same thing. One is only the means of forming the collective will. The other is a true executive function. The argument used by the Court that, in fact, the General Assembly had consistently arrogated to itself the right to exercise this supervisory function is somewhat unconvincing; for the General Assembly has become renowned for its lack of concern with any constitutional limitations.

amendment It is, therefore, hardly surprising that, in his separate opinion, Judge Sir Arnold McNair should have arrived at the conclusion that to subject the Union of South Africa to the administrative supervision of the United Nations 'would amount to imposing a new obligation upon the Union Government and would be a piece of judicial legislation'.¹⁹ It would have been

effect ¹⁵ Cf. *loc. cit.* in note 13 above, p. 218.

¹⁶ See further *loc. cit.* in note 9 above, Chap. 31.

¹⁷ *I.C.J. Reports* 1950, p. 140.

¹⁸ *Ibid.*, p. 137.

¹⁹ *Ibid.*, p. 162.

wiser and more convincing if the Court had accepted this position and had relied entirely on its secondary argument, that is to say, the repeated, though somewhat contradictory, undertakings which the Government of the Union volunteered in the last Assembly of the League of Nations, in the General Assembly of the United Nations and in its communications to the Secretary-General of the United Nations.²⁰

Instances of the other extreme, that is to say, undue regard for the principle of imposing the minimum of obligations on sovereign States, are furnished by the case of *Interpretation of Peace Treaties* (1950) and the *Asylum Case* (1950) between Colombia and Peru.

In its advisory opinion on *Interpretation of Peace Treaties (First Phase—1950)* the World Court arrived unequivocally at the conclusion that all the conditions required by the Peace Treaties of 1947 for the commencement of the stage of the settlement of disputes by the commissions under these treaties were fulfilled. Moreover, 'in view of the fact that the Treaties provide that any dispute shall be referred to a commission "at the request of the other party", it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise, the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose'.²¹

The Resolution of the General Assembly of October 22, 1949, contained further questions which the World Court was only asked to answer if it came to the conclusion that the ex-satellites of the European Axis were under an obligation to appoint their members of these Commissions. If, after a delay of thirty days from the delivery of the advisory opinion, Bulgaria, Hungary and Rumania had not notified the Secretary-General of the United Nations that they had appointed their representatives, the World Court was to examine two further issues. In the circumstances, was the Secretary-General of the United Nations authorised to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the three Treaties? Finally, was a Commission composed of a

²⁰ *I.C.J. Reports 1950*, pp. 134–135. See, however, the separate opinions of Judge Sir Arnold McNair (*ibid.*, pp. 160–161) and Judge Read (*ibid.*, pp. 169–172).

²¹ *Ibid.*, p. 77.

representative of one party and a third member appointed by the Secretary-General a Commission, within the meaning of the Peace Treaties, competent to make a binding decision?

The International Court of Justice—with the notable exception of Judge Azevedo and Judge Read—held that ‘the case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own commissioner’.²² The Court, therefore, arrived at the conclusion that the Secretary-General of the United Nations was not authorised to proceed to the appointment of the third commissioner, and that there was no need for it to consider the last question.

To put it mildly, this advisory opinion is unfortunate. It is inimical to the rule of law and must severely shake confidence in the pledged word in international relations. It is an invitation to practise bad faith with impunity and it is a regrettable blow to arbitration in general. Moreover, it is contrary to the best traditions of the Permanent Court of International Justice and stands in marked contrast to the practice of the International Court of Justice itself in other cases. At best, it is a deplorable aberration. Regretfully the mind turns back to those happier times when men of Max Huber’s and Anzilotti’s calibre impressed their stamp on the work of the World Court. The only consolation is that two of the strongest judges on the International Court of Justice refused to take any responsibility for this product of collective frustration and voiced their dissent in forceful and convincing dissenting opinions. It need only be mentioned in parenthesis that the sole exponent of the ‘new’ international law on the World Court formed part of the compact majority.

In the view of the majority of the members of the Court, the appointment of a third member by the Secretary-General should follow the appointment of both the national commissioners. This was in accordance with the ‘natural and ordinary meaning’ of the terms of the Peace Treaties.²³ In any case, the alternative procedure envisaged in the Resolution of the General Assembly would result in the constitution of a two-member commission.

²² *I.C.J. Reports 1950*, p. 227.

²³ *Ibid.*, p. 227.

This could only decide by unanimity, whereas the Peace Treaties had provided for three-member commissions, entitled to make majority decisions. The failure of the ex-satellite States to appoint their commissioners involved their international responsibility, but could not be remedied 'by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them'.²⁴

The Court's advisory opinion is equally incompatible with the principles of good faith in international law and of the effectiveness of treaties.

It is admitted in the majority opinion that, apart from exceptional cases, the draftsmen of arbitration treaties thought it unnecessary to anticipate the refusal of a party to appoint its own commissioner. From this unexceptionable analysis of the treaty material the International Court of Justice drew a surprising conclusion: 'The few treaties containing express provisions for such a refusal indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation'.²⁵

Actually, clauses like Article 10 of the Convention of Conciliation and Arbitration of November 21, 1941, between Colombia and Uruguay²⁶ may, in appearance, cover difficulties regarding the appointment of any of the arbitrators. In fact, however, they aim at the settlement of disputes regarding the appointment of members of the tribunal other than the national commissioners. Still rarer instances in modern practice of directly relevant clauses²⁷ are petrified survivals from earlier stages of arbitration when it could not yet be taken for granted that the obligation of States to appoint their national commissioners followed from the principle of good faith, and that non-compliance with this rule necessarily entailed the consequences of a breach of good faith.²⁸

²⁴ *I.C.J. Reports 1950*, p. 229.

²⁵ *Ibid.*, p. 229.

²⁶ United Nations. *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*, 1948, p. 1139.

²⁷ Article 239 (a) of the Peace Treaty of Trianon of June 4, 1920, between the Allied and Associated Powers and Hungary.

²⁸ See, for instance, the treaties mentioned in the present writer's 'International Law in Early English Practice' (25 *B.Y.I.L.* (1948), pp. 82-85). As emerges from the subsequent volume of the *B.Y.I.L.* (1949), at least one of the judges appears to have been painfully aware of this gap in the

A historical and systematic examination of these clauses would have enabled the Court to determine with relative accuracy the time at which this originally optional standard became embodied in international customary law and when, therefore, there was no longer any need for express provision to this effect in individual arbitration treaties. Even without awareness of the potentialities inherent in the study of treaty standards for ascertaining the time of their transformation into rules of international customary law,²⁹ mere common sense might have suggested to the majority an alternative to its somewhat formalistic treatment of the subject.

In the words of Judge Read, 'there have been a great many arbitration clauses included in treaties in the course of the last century and a half, and no recorded instance has been drawn to the attention of the Court in which a party to a dispute has sought to evade arbitration by the comparatively simple device of refraining from appointing its national representatives. International practice has treated these provisions as conferring rights or privileges upon the parties to the dispute which they would refrain from exercising at their peril—the peril of being confronted with an arbitral decision by a tribunal on which they had no representative'.³⁰ As Judge Read rightly stressed, none of the sixty-one States entitled to appear before the Court—not even Bulgaria, Hungary and Rumania—ventured to make in their observations any contention to the contrary: 'The fact that no State has adopted this position is the strongest possible confirmation of the international usage or practice in matters of arbitration which is set forth above'.³¹

The majority of the Court also made light of the instances in which arbitration commissions made valid decisions although the original number of its members was subsequently reduced by such circumstances as the withdrawal of one of the commissioners.

intellectual equipment of the Court (admittedly, not of the Court alone). In his paper on 'Aspects of State Sovereignty', Sir Arnold McNair accurately stated (p. 6, n. 1): 'I find that most history of international law is either a history of its literature, or a history of international relations including political doctrines such as the Balance of Power or the Monroe Doctrine. It is difficult to find much history of the content, that is, the actual rules of law as applied in practice'.

²⁹ See further the present writer's 'The Province and Standards of International Economic Law' (2 *International Law Quarterly* (1948), p. 406 *et seq.*) and *loc. cit.* in note 13 above, pp. 49–50.

³⁰ *I.C.J. Reports 1950*, pp. 241–242.

³¹ *Ibid.*, p. 242.

It distinguished these cases as they presupposed the initial validity of any of these tribunals. Actually, in both cases, the essential feature is the same: 'No party to a treaty can destroy the effect of the treaty itself by its own default or by its failure to exercise a right or a privilege'.³²

Moreover, the stage of the formation of an arbitration tribunal is hardly as important as the final stage when the tribunal makes its decision. In Judge Azevedo's dissenting opinion this point was duly stressed: 'The organ which loses a member without being able to replace him remains, from another angle, in a more serious position than the one which started its work with an incomplete bench, but in the hope or, at least, with the possibility that a change in the attitude of the defaulting State before the end of its work would permit its conclusion'.³³

The plea of the minority judges to give full vent to the application of the principle of good faith in the interpretation of international treaties is entirely in accordance with the practice of other international judicial institutions, and especially that of the Permanent Court of International Justice.³⁴

To ignore this principle is to make a mockery of the administration of international justice. Judge Read did not mince his words on this vital point: 'I am bound to take into account the fact that, in the existing circumstances and under existing international law, a defaulting government could not object to the competence of such a tribunal. If it raised the objection before such a Treaty Commission it would be bound to apply existing international law and refuse to let such a government profit from its own wrong. If it raised the objection in proceedings before this Court it would be necessary for the International Court of Justice, which is not a law-making organ, to apply existing legal principles and recognise that it was estopped from alleging its own treaty violation in support of its own contention. It is impossible for me, acting as a judge in advisory procedure, to raise this objection, which the defaulting government itself would be prevented from raising in any proceedings which recognised the principles of justice'.³⁵

³² Judge Read, *ibid.*, p. 241 and, similarly, Judge Azevedo, *ibid.*, p. 253.

³³ *Ibid.*, p. 253.

³⁴ See further *loc. cit.* in note 13 above, pp. 27, 193, 260-261, 372, 396, 436, 471, 474 and 532-533.

³⁵ *I.C.J. Reports 1950*, p. 244.

Resort to a functional interpretation of the Peace Treaties of 1947, in accordance with the principles laid down by the Permanent Court of International Justice regarding the effectiveness of obligations under international treaties,³⁶ confirms the results reached by the dissenting opinions on grounds of good faith.

The majority of the International Court thought that, in sanctioning Treaty Commissions composed of one representative of a party and a third member appointed by the Secretary-General of the United Nations, it would entirely alter the character of the Commission as envisaged by the contracting parties.

In the first place the defaulting States remained free at every stage of the proceedings to remedy this deficiency, for which they alone were responsible. They alone prevented the Commissions from functioning in accordance with the Peace Treaties and from applying in their proceedings the fundamental principle *audiatur et altera pars*. Secondly, this interpretation entirely ignored what, in fact, happens in such three-man commissions. In order to achieve a majority each of the national representatives does all in his power to persuade the third member of the justice of his country's cause. The third member, in turn, will try to approximate his own views to that of the national commissioner with whom he is more nearly in agreement. Thus, in effect, a majority judgment rests on the agreement of two of the three members.

The situation is not so very different if *ab initio*, or at a later stage, one of the national commissioners absents himself. The third member is likely to represent what appears to him justifiable in the position that, in all probability, would have been taken by the absentee and his government. In turn, the party represented in the commission will prefer agreement with the third member to an indefinite impasse. Thus, in both cases, the result is likely to be a compromise, rationalised retrospectively into an award by the choice of the appropriate major premises and rules of treaty interpretation.

In any case it would no more have amounted to a revision of the Peace Treaties to make these commissions effective than did the bolder line taken by the Permanent Court of International

³⁶ *I.C.J. Reports 1950*, pp. 235 and 244-245; Judge Azevedo, *ibid.*, p. 253; H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (26 *B.Y.I.L.* (1949), p. 67 *et seq.*), and *loc. cit.* in note 13 above, p. 218 *et seq.*

Justice in comparable instances amount to judicial legislation. The World Court consistently interpreted its function as being to implement the intention of the parties to arbitration agreements so as to enable them to settle their disputes with finality.³⁷ In its judgment of April 9, 1949 in the *Corfu Channel Case* the International Court of Justice itself quoted with approval a passage from an Order of its predecessor: 'In case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'.³⁸

Moreover, the International Court did not always err on the side of discretion. With regard to the United Nations, it held that 'under international law the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.³⁹ Nor, in the case of the commissions under the Peace Treaties of 1947 was it necessary in order to achieve a less Quixotic result to go so far as the Court did in the case of the *International Status of South-West Africa* (1950).⁴⁰ If the dissolution of the League of Nations presented merely 'mechanical difficulties'⁴¹ for the continuation of the mandates system, and the substitution of the General Assembly for the League Council could be derived from the interpretation of treaties and unilateral declarations, the effective constitution of the commissions under the Peace Treaties of 1947 in defence against open sabotage by the ex-satellite States was a much more modest proposition.

The opposite position has been appropriately characterised by Judge Read: 'In the entire history of the Permanent Court there is no instance in which an argument was advanced that went so far in depriving a treaty of a great part of its value, or in frustrating its general purposes and objects, as the contention

³⁷ Cf. *loc. cit.* in note 13 above, pp. 146 and 219-220.

³⁸ *I.C.J. Reports* 1949, p. 24. See also *ibid.*, p. 26.

³⁹ *Reparation for Injuries Suffered in the Service of the United Nations* (1949), *I.C.J. Reports* 1949, p. 182.

⁴⁰ See above, p. 10.

⁴¹ Separate opinion of Judge Sir Arnold McNair in the case of *International Status of South-West Africa* (1950), *I.C.J. Reports* 1950, p. 155.

necessarily involved in a negative answer to Question IV'.⁴² The majority of the Court upheld this contention. Thus, in passing judgment on the argument, Judge Read gave by implication a hard, but justified, verdict on the majority opinion of the International Court of Justice itself.

In the *Asylum Case* (1950) between Colombia and Peru the World Court was again faced with the dilemma of chartering a safe passage between the Scylla of State freedom and the Charybdis of undue interference with the exercise of State jurisdiction. By contrasting diplomatic asylum with territorial asylum, the issue in extradition cases, the Court strongly emphasised the exceptional degree of interference with the domestic jurisdiction of States that of necessity any grant of diplomatic asylum implies: 'In the case of extradition the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State. In the case of diplomatic asylum the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case'.⁴³

Fortified by this distinction the majority of the Court proceeded to an exceedingly narrow construction of the Havana Convention on Asylum of 1928. Limitation of space permits reference to only one of the Court's exercises in the interpretation of this convention, that is, who was entitled, under the convention, to qualify the offence of the person seeking asylum as entitling the receiving State to grant such protection.⁴⁴

⁴² *I.C.J. Reports* 1950, p. 237. See, however, for an able defence of this advisory opinion, K. S. Carlston, 'Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania' (44 *A.J.I.L.* (1950), p. 728 *et seq.*).

⁴³ *I.C.J. Reports* 1950, pp. 274-275.

⁴⁴ The view taken by the majority of the Court on what constitutes an urgent case in the meaning of the Havana Convention would be equally open to criticism (cf. *ibid.*, p. 282 *et seq.*, and the dissenting opinions of

In the absence of compulsory arbitration, three possibilities exist. This function may be left with the territorial State. In this case the institution of asylum is likely to prove nugatory. The right may rest with both parties concerned, the State against which asylum is sought and the State granting asylum. It was held by the Court that, in the absence of a rule to the contrary, *Def.* this must be presumed to be the position; for the claim to unilateral qualification by the State granting asylum would aggravate the 'derogation from territorial sovereignty constituted by the exercise of asylum'.⁴⁵ Then, as happened in the case before the World Court, there may be an indefinite deadlock, and the refugee may have to stay for an unforeseeable period in the legation of the State granting asylum. If this risk had to be run in more than isolated cases, States would become somewhat reluctant to grant diplomatic asylum at all. The only other possibility is to leave the decision with the State granting asylum.

The test of unilateral qualification by the State granting asylum was adopted in the Montevideo Convention on Political Asylum of 1933. As, however, Peru had not ratified this convention, the Court refused to invoke it against Peru. The very fact that, in the preamble of the Montevideo Convention, it was stated that this Convention modified the Havana Convention of 1928, and that it was considered necessary to incorporate in the Montevideo Convention an article accepting the principle of unilateral qualification⁴⁶ appears, at first sight, to strengthen the Court's interpretation *a contrario* of the Havana Convention.

Several considerations, however, militate against this conclusion. It means understating the real situation by a long way to hold that the institution of asylum 'would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum'.⁴⁷ The practically unlimited exercise by the territorial State of its veto of the qualification by the State granting asylum would reduce the institution of asylum to meaninglessness. While refusing the right of unilateral qualification to the State granting

Judge Alvarez, *ibid.*, pp. 298 and 302; of Judge Badawi Pasha, *ibid.*, p. 303 *et seq.*; of Judge Read, *ibid.*, pp. 318, 322-323 and 325 *et seq.*, and of Judge Azevedo, *ibid.*, pp. 334-335 and 352 *et seq.*

⁴⁵ *Ibid.*, p. 275.

⁴⁶ *Ibid.*, p. 276.

⁴⁷ *Ibid.*, p. 275.

asylum, this interpretation, in effect, goes far towards granting this right to the territorial State. Thus, this interpretation runs counter to the principle of effectiveness of treaty obligations, as developed by the Permanent Court of International Justice and upheld by the International Court of Justice in the *Corfu Channel (Merits) Case* (1949).⁴⁸

Moreover, the Court's defence of non-intervention as 'one of the most firmly established traditions of Latin America'⁴⁹ is only superficially impressive. The intervention of which, in the formative stage of the reception of this doctrine into Latin American practice, Latin American States were afraid was hardly intervention by any other Latin American State. In his dissenting opinion, Judge Azevedo discreetly pointed to the powers against which this defensive wall had been erected.⁵⁰ As the United States and, with minor and half-hearted exceptions, the European powers did not claim to be entitled to the right of granting diplomatic asylum, there was little danger of the right of asylum between Latin American States becoming a cloak for foreign intervention.

Furthermore, over more than a century the institution of asylum had developed on a basis of reciprocity. This fact alone sufficed to leave the practice of asylum between Latin American States untainted with any stigma of intervention.⁵¹ Actually, Article 2 of the Havana Convention lifted the principle of reciprocity from its normal beneficial place in the background to the level of a formal legal principle; for, under this Convention, asylum need only be respected 'to the extent to which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted (*pays de refuge*) and in accordance with the following provisions'. In its analysis of this reciprocity clause, the majority of the Court held that nothing could be deduced from this provision in so far as the right of unilateral qualification was concerned.⁵² None the less, had the majority of the Court given greater weight due to the reciprocity element in diplomatic

⁴⁸ See above, p. 16 *et seq.*, and Judge Alvarez's dissenting opinion, *I.C.J. Reports* 1950, p. 297.

⁴⁹ *Ibid.*, p. 285.

⁵⁰ *Ibid.*, pp. 340-341.

⁵¹ This point, too, was duly emphasised in Judge Azevedo's dissenting opinion, *ibid.*, p. 343.

⁵² *Ibid.*, p. 276.

asylum, it might have been less overawed by its fear of countenancing any unwarranted intervention in the domestic jurisdiction of the Latin American States.

Finally, the fact that Judge Azevedo and the Colombian judge *ad hoc* who, in this case, could not be charged with the defence of any vested national interest of his country, dissented from the majority, necessarily causes uneasiness. They voiced their dissent in opinions which appear to be closer to the reality of the institution of asylum as applied in Latin America than the majority decision. The Court's attempt to solve the issue by means of a restrictive interpretation of the Havana Convention and by arguments *a contrario* conducive to the same result is too facile to be convincing. The minority view was further strengthened by the support it received from Judge Read. The Canadian member of the Court, too, found it impossible to ignore the almost constant practice which Latin American States, including even Peru in other cases before and during the same disturbance, had adopted over a prolonged period.⁵³ By demanding excessive evidence of the existence in this case of *opinio necessitatis*, one of the constitutive elements of every rule of international customary law,⁵⁴ the International Court of Justice dealt a gratuitous blow to a beneficial regional institution which once had formed part of universal international law, into which the Latin American Republics had breathed new life, and which they had adapted to 'meet the political and social needs of the Pan-American world'.⁵⁵

It is easier to agree with the International Court of Justice on its resolute affirmation of the principle of State sovereignty against intervention in the technical sense of the term. Unless such intervention can be justified on grounds of consent or reprisals, it is illegal.

In its judgment of April 9, 1949, on the *Corfu Channel* (Merits) Case, the World Court had to deal with the legality of the British minesweeping operation in Albanian territorial waters

⁵³ *I.C.J. Reports* 1950, p. 321. Cf. also Judge Azevedo's dissenting opinion, *ibid.*, pp. 337-338.

⁵⁴ *Ibid.*, pp. 276-277. In the *Corfu Channel* (Merits) Case (1949) the International Court of Justice proceeded in a more sanguine mood. It laid down somewhat summarily the law on the criteria of an international strait (*I.C.J. Reports* 1949, p. 28) and on the rights of Albania in view of her strained relations with Greece (*ibid.*, p. 29).

⁵⁵ Judge Read in his dissenting opinion, *ibid.*, p. 317.

in November, 1946, three weeks after the actual Corfu incident.

It was submitted on behalf of the United Kingdom that this action was a form of judicial intervention. Its object was to secure possession of evidence in Albanian territory in order to submit it to the World Court and, thus, to facilitate the Court's task. Justly, the Court, including its British member, characterised this claim as the 'manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law'. If the Court was meant to take kindly to such acts because they were intended to serve the interests of international justice, it made short work of this too blatant argument *ad curiam*: 'Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'.⁵⁶ Nor did the Court like any better the alternative British argument of self-protection or self-help. Even in a case in which the Albanian Government had been guilty of a most serious international tort, the World Court held that the subsequent British minesweeping action could not be justified on this ground either; for, 'between independent States, respect for territorial sovereignty is an essential foundation of international relations'.⁵⁷

A more satisfactory, and less martial, solution than unilateral action by one of the parties may be attained by a reasonable distribution of the burden of proof. When the alleged tortfeasor exercises exclusive control over the *locus delicti*, the victim may be unable to furnish direct proof of facts giving rise to responsibility. Then, as the International Court of Justice rightly held, 'such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence'.⁵⁸ Yet, the more serious the charge the greater is the degree of certainty that is required to hold a sovereign State responsible for any act alleged by another State to be illegal.⁵⁹

(2) *Scope of the Court's Jurisdiction*. In line with the previous development of international arbitration and the judicial settle-

⁵⁶ *I.C.J. Reports* 1949, p. 35.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 18.

⁵⁹ *Ibid.*, p. 17.

ment of international disputes, the Charter of the United Nations left to each member the decision whether or not to accept the principle of 'compulsory' arbitration.⁶⁰ As in this case, too, the Court's jurisdiction rests on voluntary submission of legal disputes by the parties to the Court, it would avoid confusion if the terms 'voluntary' and 'compulsory' jurisdiction were replaced by the trichotomy of *ad hoc*, limited and general jurisdiction of international judicial institutions.⁶¹

In defining the scope of its jurisdiction, the World Court found a happy mean between an undue acquisitiveness and an unwarranted reluctance to take up its appointed functions.

In the *Corfu Channel (Preliminary Objection) Case* (1948) the International Court of Justice firmly resisted the temptation to extend its jurisdiction by way of the back door. Contrary to the clear distinction in the Charter between recommendations and decisions of the Security Council—the latter exclusively under Chapter VII of the Charter—those responsible for the preparation of the British case allowed themselves to be persuaded to put forward a somewhat dubious proposition. It was submitted to the World Court that the recommendation of the Security Council to Albania and the United Kingdom to refer their dispute to the Court amounted to a decision in the strict sense. In accepting the Security Council's invitation, Albania had undertaken all the obligations of a member State for the purposes of the dispute. The implication of the British argument was that, under Article 25 of the Charter, Albania, like any member of the United Nations, was bound to accept and carry out this 'decision' of the Security Council.

The World Court upheld its jurisdiction in the *Corfu Case* on other grounds⁶² and, therefore, found it unnecessary to consider this remarkable argument explicitly. It pointedly referred three times, however, to the 'decision' as a recommendation, thus giving it its proper legal qualification.⁶³ In the joint separate opinion of seven members of the Court, the British submission fared still worse and was not unfairly described as an attempt

⁶⁰ See further E. Hambro, 'Some Observations on the Compulsory Jurisdiction of the International Court of Justice' (25 *B.T.I.L.* (1948), p. 133 *et seq.*).

⁶¹ Cf. *loc. cit.* in note 13 above, p. 399 *et seq.*

⁶² See below, p. 24.

⁶³ *I.C.J. Reports 1947-1948*, pp. 26 and 28.

to introduce 'more or less surreptitiously' a new type of compulsory jurisdiction.⁶⁴

Actually, the International Court of Justice neatly solved the issue of competence in the *Corfu Case* by deriving it from Albania's implied acceptance of the Court's jurisdiction in a letter of July 2, 1947, addressed by the Albanian Government to the Court.⁶⁵ This line of argument was in the best tradition of the Permanent Court of International Justice⁶⁶ and entirely sufficed to meet the case in point.⁶⁷

In the peculiar international environment of the post-1945 period the consultative work of the World Court is still more important than its strictly judicial function. Article 65 of the new Statute clarifies beyond doubt the discretionary character of the Court's advisory jurisdiction.⁶⁸ The International Court of Justice may, but is not bound to, comply with a request for an advisory opinion. Thus the Court has a large measure of discretion, and the way in which it has exercised this authority may be illustrated by its attitude to three major objections to the assumption of advisory jurisdiction. They are based on the political character of questions asked; the danger of a surreptitious substitution of compulsory for voluntary judicial settlement by means of advisory opinions, and the possibility of interfering with the rights of non-members of international institutions.

In the case of *Conditions of Admission of a State to Membership in the United Nations* (1948), the first request for an advisory opinion received by the International Court of Justice, the issue arose whether the political character of the question militated against it being answered by the Court.

As in the case of the distinction between legal and political

⁶⁴ *I.C.J. Reports 1947-1948*, p. 32.

⁶⁵ *Ibid.*, p. 27.

⁶⁶ Cf. *loc. cit.* in note 13 above, p. 404.

Little appears to be gained, though no harm done, from the introduction into international procedural law of the Roman law notion of *forum prorogatum* to describe cases in which the jurisdiction of an international judicial institution is founded on subsequent express or implied consent by one of the parties. See, however, C. H. M. Waldock, 'Forum Prorogatum' (2 *International Law Quarterly* (1948), p. 377 *et seq.*).

⁶⁷ A still more elegant way in which the Court might have established its jurisdiction was mentioned by Professor—to the Court's loss, unfortunately, no more Judge—Hudson in one of his masterly surveys of the work of the World Court ('The Twenty-seventh Year of the World Court', 43 *A.J.I.L.* (1949), p. 5).

⁶⁸ See further *loc. cit.* in note 13 above, p. 479 *et seq.*

disputes, no objective criterion exists by reference to which the legal or political character of a question submitted to the Court for an advisory opinion can be determined. Every international issue has its legal and political aspects. Necessarily, the World Court as an international judicial institution may only concern itself with the legal side of such a controversy. Once, therefore, the Court refused to accept jurisdiction on the ground that such an issue has also its political side, it could hardly ever comply with a request for an advisory opinion.

Rightly, the World Court refused to become a party to the attempt in this way to reduce its advisory jurisdiction to nought: 'To determine the meaning of a treaty provision—to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein—is a problem of interpretation and consequently a legal question.'⁶⁹ In this respect it does not make any difference whether the treaty in question is the Charter of the United Nations or any other multilateral, or bilateral, treaty. The Court weakened its position unnecessarily by linking the non-political character of a question submitted to it with the abstract nature of its formulation, a flaw in the majority opinion that was not lost on Judges Krylov and Zoričić.⁷⁰

Another objection to the advisory work of the World Court is more serious. The jurisdiction of international judicial institutions is still voluntary. Is not compliance with requests for advisory opinions on pending disputes, therefore, an illegitimate circumvention of the requirement of consent and another back door method of imposing truly compulsory arbitration on States?

In a formal sense this argument can always be refuted by reference to the non-binding character of advisory opinions as distinct from judgments of the World Court.⁷¹ In fact, however, advisory opinions have the same degree of persuasive authority,⁷² and the fact that they do not produce the effects of *res judicata* is somewhat insignificant.

The Court's answer was that, while the principle of voluntary

⁶⁹ *I.C.J. Reports 1947-1948*, p. 61, reaffirmed in *Competence of Assembly regarding Admission to the United Nations* (1950), *ibid.*, 1950, p. 6.

⁷⁰ *Ibid.*, 1947-1948, pp. 95 and 107.

⁷¹ *Interpretation of Peace Treaties (First Phase—1950)*, *I.C.J. Reports 1950*, p. 71.

⁷² See further *loc. cit.* in note 13 above, p. 487.

arbitration had been maintained, the Charter of the United Nations had authorised organs of the United Nations and, with the consent of the General Assembly, those of specialised agencies to ask the World Court for guidance on legal issues: 'The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organisation and, in principle, should not be refused'.⁷³ In the view of the International Court of Justice this argument applies whether or not the request for an advisory opinion relates to a legal question actually pending between States and whether it relates to issues affecting members of the United Nations only or non-members as well.⁷⁴

In these general terms the statement of the position by the International Court of Justice in the case of *Interpretation of Peace Treaties (First Phase—1950)* presents a marked departure from the advisory opinion of the Permanent Court of International Justice in the *Eastern Carelia Case* (1923).⁷⁵ The International Court was, however, able to distinguish the actual case before it from the *Eastern Carelia Case* on two grounds. Its answer did not concern the same issue as was in dispute between the five States concerned. Moreover, it did not involve dealing with controversial questions of fact.⁷⁶

Any remaining doubts as to the Court's general proposition⁷⁷ result from its claim to advise organs entitled to request opinions on matters affecting non-member States. In paragraph 6 of Article 2 the Charter arrogates to the United Nations a limited competence regarding non-members. The compatibility of this clause itself with international law is controversial.⁷⁸ In any case, the self-assumed jurisdiction of the United Nations under Article 2 of the Charter is limited to action necessary for the maintenance of international peace and security.

Unless a request of the General Assembly for an advisory opinion were justified in this way—in view of the Security

⁷³ *Interpretation of Peace Treaties (First Phase—1950)*, I.C.J. Reports 1950, p. 71.

⁷⁴ *Ibid.*, p. 71.

⁷⁵ Cf. Judge Azevedo's separate opinion, *ibid.*, p. 81 *et seq.*

⁷⁶ *Ibid.*, p. 72.

⁷⁷ See text to note 74 above.

⁷⁸ See further H. Kelsen, *The Law of the United Nations*, 1950, pp. 75–76, and *loc. cit.* in note 13 above, pp. 529–530.

Council's primary responsibility for the maintenance of international peace and security, a doubtful proposition—the competence of the United Nations to request advisory opinions affecting non-members appears to require a more solid foundation.

In the case of *Interpretation of Peace Treaties* it could be derived from the functions allocated in the Peace Treaties of 1947 to the Secretary-General of the United Nations with the consent of the non-member States concerned. As the Secretariat of the United Nations is not entitled to ask the World Court for an advisory opinion, the General Assembly was within its rights in taking the necessary steps to provide the Secretary-General with guidance from the highest judicial international authority. It would also have been possible to base the jurisdiction of the General Assembly in this case on Article 10 in conjunction with Article 14 of the Charter of the United Nations.

It may be regretted that the International Court of Justice did not consider it necessary to assure itself more articulately on the competence of the General Assembly to concern itself with the question of the Peace Treaties of 1947. If for no other reason, the Court owes it to itself not to assist any international organ in activities that may be *ultra vires* and may constitute unjustified interference with the affairs of third States.

(3) *Effects of Treaties on Third Parties.* It would be uncharitable to stress this point unduly, were it not for the fact that on another occasion the International Court of Justice had already shown a tendency to minimise the principle *pacta tertiis nec nocent nec prosunt*.

In the case of *Reparation for Injuries Suffered in the Service of the United Nations* (1949) the World Court had arrived at the sensible conclusion that the United Nations 'could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.⁷⁹ The Court, therefore, held that in the relations between the United Nations and the States which had created this comprehensive inter-

⁷⁹ *I.C.J. Reports 1949*, p. 179.

national institution, the United Nations had to be regarded as a subject of international rights and duties.

For a non-member State, however, the intentions of the founders of an international institution are a matter which it is free to accept or to ignore. To a third State, the creation of an international organisation by other States is *res inter alios acta*. As in the case of the recognition of other subjects of international law, recognition or non-recognition of the existence of the United Nations as an entity endowed with international personality is left to the unfettered discretion of a non-member State.

In the Interim Arrangement on Privileges and Immunities of the United Nations between the United Nations and Switzerland of July 1, 1946, it is taken for granted that this is the position in international law. It provides that 'the Swiss Federal Council recognises the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organisation cannot be sued before the Swiss courts without its express consent'.⁸⁰ This was not an accidental formulation. It is a literal transcription from the *modus vivendi* between the League of Nations and Switzerland of September 18, 1926.⁸¹ Thus, it represents the considered practice of a non-member State reputed for its respect for international law which was accepted both by the League of Nations and the United Nations.

In what Professor Hudson appropriately called a 'very laconic answer',⁸² the International Court of Justice summarily aired a somewhat different view: 'The Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with capacity to bring international claims'.⁸³

⁸⁰ Article 1 (1 *United Nations Treaty Series* (1946-1947), p. 165.

⁸¹ League of Nations. *Official Journal*, 1926, p. 1422. Cf. also Chicherin's Reply of July 17, 1920 to Lord Curzon's Note on Russo-Polish Relations (J. Degras (editor), *Soviet Documents on Foreign Policy*, 1951, p. 195), and the Soviet Note on the Aaland Islands of November 13, 1921 (*ibid.*, p. 277).

⁸² 'The Twenty-eighth Year of the World Court' (44 *A.J.I.L.* (1950), p. 15).

⁸³ *I.C.J. Reports* 1949, p. 185.

With reference to a legal system consisting of about eighty entities, to consider fifty of them as a 'vast majority' looks suspiciously like an overstatement. Moreover, what is the point of referring to the number of members in 1945 when, by reference to the figures of 1949, a much more impressive result could have been obtained?⁸⁴ Did the Court really think that the intention of the contracting parties at the time of the foundation of the United Nations was of relevance for third States? Finally, what is an objective, as distinct from a subjective, international personality if not a figure of speech designed to impose obligations on non-contracting States? Any such pretension is hardly compatible with the principle of sovereign equality, on which, according to paragraph 1 of Article 2, the United Nations is founded, and which its 'principal judicial organ'⁸⁵ should be the last to deny to non-members.

It might have been wiser if the Court had not committed itself to such a wide statement of the law. If it thought it necessary to take this line in order to be able to answer an abstract question in abstract terms and, at the same time, to cover the concrete case of Israel, then still a non-member, a fuller treatment of the issue would have given greater persuasive authority to this part of the Court's advisory opinion.

In that case the Court would have had to deal *in extenso* with the tenet that law-making treaties affect the rights of third States who refuse to acquiesce in such international 'legislation'.⁸⁶ The Court might also have examined—as Judge Badawi Pasha suggested in his dissenting opinion⁸⁷—the conditions in which the obligation to protect an agent of the United Nations against a non-member State might arise. Such an analysis might have led to fruitful distinction. It would have emerged that in the type of case that arose over the assassination of Count Bernadotte the non-member State concerned had acknowledged,

⁸⁴ This point is rightly emphasised by Professor Hudson (*loc. cit.* in note 82 above).

⁸⁵ Article 92 of the Charter of the United Nations.

⁸⁶ In his separate opinion in the case of *International Status of South-West Africa*, Judge Sir Arnold McNair dealt at least with some of these wider aspects of the problem (*I.C.J. Reports 1950*, p. 153 *et seq.*). Cf. also the Soviet Notes on the Aaland Islands (October 2, 1919, *loc. cit.* in note 81 above, pp. 169–170; July 22, 1921, *ibid.*, p. 251, and November 13, 1921, *ibid.*, p. 276) and on Spitsbergen (February 12, 1920, and January 6, 1923; *ibid.*, pp. 181 and 366).

⁸⁷ *I.C.J. Reports 1949*, p. 215.

or did not contest, the international personality of the United Nations. To have affirmed the capacity of the United Nations to bring international claims against this class of non-member would have been fully consonant with the existing structure of international law. To proceed in the manner of the Court's majority entails all the dangers of broad generalisations, unsupported by close and convincing reasoning. At least on this point, it is hard to disagree with the conclusion reached by Judge Krylov in his dissenting opinion: 'We are thus far outside the limits of the international law in force'.⁸⁸

In the case of the *International Status of South-West Africa* (1950) the International Court of Justice again had occasion to touch on the question of the effect of treaties on third parties. By means of an unobjectionable interpretation of the Covenant and the mandate treaty regarding South-West Africa, the Court arrived at the conclusion that the object was not merely to create contractual obligations, but an international status for the territory.⁸⁹

If this is the intention of parties to treaties, nothing stands in their way to create a state of affairs more durable than the treaties by which it is established. If, however, the term *status* is meant to imply that, irrespective of recognition, such a status is 'objective' law and has legal effects *erga omnes*, then this claim runs counter to the principle of international law, formulated with admirable clarity in Judge Read's separate opinion, that 'the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States'.⁹⁰

Actually, since its advisory opinion on *Reparation for Injuries*, the members of the Court appear to have had second thoughts; for, when the majority stated its view that 'the international rules regulating the mandate constituted an international status for the territory', it accurately qualified this interpretation by the proviso: 'recognised by all the members of the League of Nations, including the Union of South Africa'.⁹¹ In his separate opinion Sir Arnold McNair, too, thought it advisable to limit his

⁸⁸ *I.C.J. Reports* 1949, p. 218. See also L. C. Green's Note on this case in 12 *M.L.R.* (1949), pp. 509-510.

⁸⁹ *I.C.J. Reports* 1950, pp. 132 and 141.

⁹⁰ *Ibid.*, p. 165.

⁹¹ *Ibid.*, p. 132.

definition of international status as a body of rights and duties 'which are valid *in rem—erga omnes*' in a way that does not suggest *omnes* in the literal sense: '*Erga omnes*, that is, against the whole world, or at any rate against every State which was a member of the League or in any other way recognised the mandate'.⁹² 'Objective' international law within these limits is a somewhat less revolutionary proposition than the kind of law that the International Court of Justice had ventured to lay down on the corresponding subject in the *Reparations for Injuries* case.

3. ASSESSMENT OF THE COURT'S WORK

It is not surprising that the trends in the practice of the International Court of Justice do not reveal any clear line in the Court's attitude to the fundamental issues of international law. The fault may well lie with the critic. Any judgment on whether a decision errs on the side of judicial caution or audacity has its strongly subjective element. In analysing any judicial decision in the field of international law, the outside reviewer unavoidably uses as measuring rods his own interpretation of the place of law in international society and his own vista of the structure of international law.

The fact that nearly every judgment and advisory opinion of the Court is accompanied by a number of distinguished separate and dissenting opinions vividly underlines the fallibility that, on occasions, even a majority of the World Court may share with less exalted mortals. Actually, the synopsis of majority and dissenting opinions in any single case before the Court provokes a still more disturbing reflection. By the choice of the appropriate major premises and methods of treaty interpretation, every single case might have been decided in the opposite way.

To voice this view may be rank heresy in the eyes of the mighty in the realm of international law. They cannot be unaware of this agitating situation. Yet, like other augurs before them, they may consider that some things best remain unsaid. If, none the less, this point is made, it is for what is considered a compelling reason.

In most countries, or at least those whose courts enjoy the highest repute, the judiciary operates within a highly integrated

⁹² *I.C.J. Reports 1950*, p. 156.

community. It is recruited from members of a legal profession which has its roots deep in the national tradition and shares a common outlook on basic values. Moreover, the very plenitude of decisions, as well as an established hierarchy within the judiciary, narrows the margin of error.

International society is deeply divided. The minimum qualifications laid down in the Statute of the World Court for candidates are not very exacting. The membership of the Court is the result of a double election by the Security Council and the General Assembly. It is, thus, unavoidably influenced by informal understandings among the electors. The submission of disputes to international judicial institutions is still the exception rather than the rule. Thus, the mills of international justice grind still more slowly than those of national courts, but for the opposite reason. Unlike individuals under municipal law, States cannot be forced to submit to the jurisdiction of the World Court. Other reasons apart,⁹³ this accounts to a great extent for the paucity of cases submitted to international judicial institutions. All the more, therefore, must the authority of the World Court rest on the persuasiveness of its judgments and opinions.

There is only one way to achieve the optimum that, in this respect, can be attained: the fullest and most cogent reasoning. It is probably not accidental that the least convincing statements made by the International Court of Justice excel by a remarkable economy of argument. Although not limited to this field, this tendency is disturbingly pronounced in the rules applied by the World Court in the interpretation of treaties. Rightly, Professor Lauterpacht thought it necessary to observe: 'That method of applying principles of interpretation without appending to them any technical description is a constant feature of the activity of the Court.'⁹⁴

If trends in any institution give cause for anxiety, emphasis on these points imparts an unavoidably critical tone to a paper concerned with such a topic. In assessing, however, the work of the International Court of Justice in perspective, it is equally necessary to stress—if only with the utmost brevity—the brighter sides of the picture.

⁹³ See above, p. 1 *et seq.*

⁹⁴ *Loc. cit.* in note 36 above, p. 55.

The World Court is one of the few international institutions of significance where East and West still co-operate in perfect harmony.⁹⁵ Here at least a short tribute is due to Judge Krylov, an erudite international lawyer who, in an exposed position, has so far succeeded in what looks like squaring the circle.

The United States of America, which had kept suspiciously aloof from the 'League' Court, co-operates fully with the International Court of Justice. The odd reservation attached by the United States Government to its acceptance of the Court's jurisdiction under Article 36 of the Statute of the International Court of Justice is, however, a telling symptom of a sovereignty complex that still lingers on.⁹⁶ Nevertheless, the contributions made by the United States to the Court's advisory work, and her anxiety to bring the dispute with France over the rights of United States citizens in Morocco before the World Court, deserve to be listed on the credit side of the Court's balance sheet.

The members of the World Court have also fully succeeded in maintaining the world's trust in their judicial independence. Here perhaps it is permissible to single out Judge Sir Arnold McNair. In deciding on the Albanian counter-claim in the *Corfu Channel (Merits) Case* the British member did not hesitate to vote with the other fourteen members of the Court in holding that the British action in November, 1946 constituted a violation—however nominal—of Albanian sovereignty.

Last, but certainly not least, comes the aspect of the Court's work in which the writer may be said to have acquired a vested interest of his own. To judge even by the few judgments and opinions given so far, the International Court of Justice has made a notable contribution to the application of international law. Yet the place to deal with this aspect of the Court's work is elsewhere. If the achievement of the International Court of Justice in this field is compared with that of the International Law Commission,⁹⁷ little doubt exists to which of these two bodies the cause of international law is more greatly indebted.

The shortcomings noticed in the jurisprudence of the World Court can be best remedied by making the members of the World Court work very much harder. Contrary to all experiences

⁹⁵ See further *loc. cit.* in note 5 above.

⁹⁶ See further *loc. cit.* in note 13 above, pp. 401-402.

⁹⁷ See further *loc. cit.* in note 9 above, Chap. 34.

on a humbler level, the members of this most exclusive of trade unions yearn, it may be presumed, to be given the chance of a full employment policy. Again, in contrast to all we know of other spheres of human activity, it rests with the Court's employers or if it were preferred its clients to achieve such a highly desirable increase in output. Responsibility should be squarely put where it belongs. It 'rests on the Powers, the majority of whom do not consider the moment arrived to invest the Court with compulsory jurisdiction'.⁹⁸

⁹⁸ Judge Azevedo in his dissenting opinion in the *Corfu Channel (Merits)* Case (1949), *I.C.J. Reports 1949*, p. 111.

GENERAL PRINCIPLES OF LAW AS A SUBJECT FOR INTERNATIONAL CODIFICATION

B. CHENG

‘Few things are more wanting than a code
of international law’—JEREMY BENTHAM¹

THE Charter of the United Nations provides in Article 13, paragraph 1, *inter alia*, that: ‘The General Assembly shall initiate studies and make recommendations for the purpose of: (a) . . . encouraging the progressive development of international law and its codification’. To study the methods whereby this provision may best be implemented, the General Assembly, on December 11, 1946, established a Committee on the Progressive Development of International Law and its Codification. Upon the recommendation of this committee the General Assembly, on November 21, 1947, decided to establish an International Law Commission having for its ‘object the promotion of the progressive development of international law and its codification’.²

The object pursued by the International Law Commission should be one which is of particular interest to this College, since Jeremy Bentham was the first protagonist of international codification, besides coining both the expressions ‘codification’ and ‘international law’.³

The work of international codification since the days of Jeremy Bentham has progressed but slowly, and the failure of the First, and indeed last, Codification Conference of the League of Nations is still fresh in the minds of many. The reasons for the failure of the efforts of the League in this field were carefully examined by Sir Cecil Hurst in a stimulating paper read before

¹ *Collected Works* (1843), Vol. 10, p. 584.

² The International Law Commission (ILC) has so far held two sessions: April 12–June 9, 1949, *Report to the General Assembly on the Work of the First Session*, A/CN.4/13; June 5–July 29, 1950, *Report of the ILC covering its Second Session*, A/CN.4/34.

³ See Schwarzenberger, ‘Bentham’s Contribution to International Law and Organisation’ in *Jeremy Bentham and the Law* (1948), pp. 165 *et seq.*

the Grotius Society in 1946, entitled 'A Plea for Codification of International Law on New Lines'.⁴ Sir Cecil, besides being one of the most eminent authorities on international law, has also had considerable personal experience in the work of international codification, having served on the Preparatory Committee to the League Codification Conference before his election to the Permanent Court of International Justice. In this paper Sir Cecil sounded a solemn warning on the danger of repeating the failure of the League to secure agreement,⁵ a warning which seems to have gained added significance today when the efforts of codification appear to be directed at what is 'desirable' rather than what is 'realisable'.⁶ To avoid repeating such failure, amongst other suggestions, Sir Cecil was of the opinion that international codification should, in the initial stages at least, confine itself to the broad outlines of international law. He explained as follows: 'The unregulated matters about which international lawyers differ today are to a large extent differences as to the detailed application of the principles about which there is substantial agreement; a much greater measure of success is likely to attend the effort required if it is restricted in its earlier stages to a discussion of the principles, and if the details are left on one side, to be filled in later by further study and further discussion'.⁷

As a French delegate to the Hague Codification Conference, 1930, rightly pointed out: 'We must first find a starting point, a solid basis and, as a great statesman said, we must proceed like the hunter in the marshes and advance only after finding a sure footing. We have in fact to find in the mass of juridical principles some point on which we can all agree and from which we can proceed'.⁸

The purpose of the present paper is to examine the feasibility of codifying some of the broadest principles of international law

⁴ *Collected Papers* (1950), pp. 129 *et seq.*

⁵ *Ibid.*, at p. 135.

⁶ Cf. the criteria and methods used by members of the ILC in selecting topics for codification. Meetings 2-7 of the First Session. See Summary Record of the 2nd-7th Meetings, A/CN.4/SR 2-7. Cf. also the following comment on Professor Scelle's Report on Arbitration Procedure, A/CN.4/18, (Q.V.), by Professor François at the 73rd Meeting: 'A scheme as perfect as the one Mr. Scelle proposed establishing ran the risk of remaining a dead letter', A/CN.4/SR 73, para. 62.

⁷ *Op. cit.*, p. 133.

⁸ *Acts of Conference*, Vol. 4, p. 24.

—general principles of law. Can general principles of law be a subject for international codification? First, a word of explanation may be required on the nature of general principles of law.

GENERAL PRINCIPLES OF LAW

Article 38 of the Statute of the International Court of Justice provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, international customs and 'the general principles of law recognised by civilised nations'. The Statute of the Court, therefore, recognises general principles of law as part of international law. This has indeed been the consistent view of international tribunals long before the adoption of the Statute of the World Court, and has since been confirmed both by international judicial decisions and by treaty practice. Ever since 'general principles of law recognised by civilised nations' were first mentioned in the corresponding Article of the Statute of the Permanent Court of International Justice, their exact nature has been the subject of much discussion amongst international publicists.⁹

An examination of the jurisprudence of international courts and tribunals shows that they regard these principles as fundamental principles underlying each and every legal system, including the law of nations.¹⁰ In this regard one must distinguish, as did the umpire of the Italian-Venezuelan Mixed Claims Commission (1903), when applying one of these general principles of law—the principle of prescription—between principles of law and rules of law,¹¹ even though the distinction is

⁹ See e.g., Balladore-Pallieri, *I 'principi generali del diritto riconosciuti dalle nazioni civili'*, Torino, 1931. Alcalá Carrera, *Los Principios generales de Derecho*, Mexico, 1948. Gutteridge, *Comparative Law*, Cambridge, 1946, Chap. 5. Härtle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes*, Berlin, 1933. Institut de Droit international, *Annuaire* (1932), Vol. 37, pp. 283–328; (1937), Vol. 40, pp. 183–189. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927. Ripert, *Les règles de droit civil applicables aux rapports internationaux*, *Recueil des Cours* (1933), Vol. 44, pp. 569–663. Spiropoulos, *Die allgemeine Rechtsgrundsätze*, Kiel, 1928. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Wien und Berlin, 1926; *Die allgemeinen Rechtsgrundsätze*, Wien, 1931; *Les principes généraux de droit*, *Recueil des Cours* (1935), pp. 195–259. Wolff, *Les principes généraux du droit*, *Recueil des Cours* (1931), Vol. 36, pp. 479–550.

¹⁰ See e.g., *infra*, pp. 46 et seq.

¹¹ *Gentini Case, Venezuelan Arbitrations of 1903* (hereinafter cited as *Ven.Arb.*), p. 725.

only relative and not absolute. While rules of law may differ in one legal system from another, international tribunals and the framers of the Statute hold that the underlying principles of all legal systems are essentially the same. They believe that there exists a common conception of law amongst civilised nations, and that the international legal system is but the system of international relations based upon respect for this general conception of law.¹² Rules of international law are but expressions of principles of law in inter-State relations.¹³

In the search for these general principles of law there is no inherent reason why they cannot be found by looking into the underlying principles of a particular system, not excluding the international legal system itself. But while the concept of law, developed in municipal jurisprudence for centuries past, has evolved into highly technical and rigorous systems, international law is, comparatively speaking, as yet an undeveloped order. It is, therefore, natural that, in the search for the general principles of this universal concept of law, one should look for them more especially in the municipal sphere.¹⁴

On the assumption that there exists a basic analogy between individuals and nations on the one hand, and between international relations and individual relations on the other, international courts and tribunals, in the absence of a clear rule of international law, apply to international relations those principles underlying municipal rules of law which have been found to work substantial justice between individuals, whenever the circumstances justifying their application in the municipal sphere exist equally in the international sphere. An instructive example of the resort to general principles of law is afforded by the Report, written in 1904, by Sir Cecil Hurst, then Mr. C. J. B. Hurst, and Mr. R. Newton Crane, British and American Com-

¹² Cf. e.g. Hague Convention for the Pacific Settlement of International Disputes (hereinafter cited as Hague Convention), 1907, Art. 37. See also Art. 73. Amer.-Brit.Cl.Arb. (1910): *Cayuga Indians Case* (1926), Nielsen's *Report*, pp. 203-331, at pp. 320-321. Amer.-Brit.Cl.Com. (1871): The 'Sir William Peel', dissenting opinion by Commissioner Frazer, Moore, *International Arbitrations* (hereinafter cited as *Int.Arb.*), Vol. 4, pp. 3935 *et seq.*, at p. 3953. *Procès-verbaux* of the Advisory Committee of Jurists, 1920, pp. 293 *et seq.*, especially at pp. 310-311, 316, 318, 322-325, 335, 345-346, etc.

¹³ Cf. Permanent Court of International Justice (PCIJ): The 'Lotus' (1927), A.10, p. 18.

¹⁴ Cf. International Court of Justice (ICJ): *Corfu Channel Case* (1949), dissenting opinion by Judge Azevedo, *I.C.J. Reports* 1949, p. 104.

missioners respectively, submitting what they considered to be the proper rules governing the payment of damages to German nationals who suffered losses as a result of the military activities of Great Britain and the United States at Samoa in 1899.¹⁵ The Report also shows that, in practice, one is always apt first to have recourse to one's own municipal system to find such principles, and only afterwards to resort to a comparative method to ensure that the principles in question are indeed a general conception of law and not a mere '*plaisante justice qu'une rivière borne*'.¹⁶

Doubts have sometimes been entertained concerning the fecundity, if not the existence, of this source of international law, on the ground that there are few rules of law that are identical amongst the various legal systems. One must, however, not regard these general principles of law as a kind of mathematical highest common factor among the different municipal legislations, including all their technicalities introduced on account of particular circumstances. In the words of Judge McNair, 'it would be difficult to reconcile such a process with the application of "the general principles of law"'.¹⁷ For the same reason it must be pointed out that the recognition of a particular principle as one generally accepted by civilised nations, by no means implies that any municipal system which does not apply it with all its logical conclusions, or which admits a number of modifications and exceptions thereto, is thereby to be regarded as either unjuridical or uncivilised.

As to the role of general principles of law, both in municipal law and in international law they are the cardinal principles of the legal system, in the light of which rules of law are interpreted and applied. They also apply to concrete cases in default of specific rules. This is expressly provided for in a number of municipal codes.¹⁸ In international law, which possesses but few detailed rules on which States have signified general agreement, the occasions for the application of such general principles are much more frequent. For this reason, the codification of general

¹⁵ This Joint Report No. 2 of August 12, 1904, has, so far as is known, not been published, but is extensively quoted in Whiteman, *Damages*, Vol. 3, pp. 1778-1781. See paragraph 4 (vi) of Report.

¹⁶ Pascal, *Pensées* (ed. Brunswick), fragment 294.

¹⁷ *I.C.J. Reports 1950*, p. 148.

¹⁸ E.g., the Argentine, Brazilian, Chinese, Guatamalan, Italian, Mexican, Peruvian, Siamese and Spanish Civil Codes.

principles of law is of particular value in the international legal system.

What are these general principles of law, and are they susceptible of international codification? To enumerate them exhaustively may be difficult, but it is possible to cite those that have been consistently recognised as such by international courts and tribunals, and see if they can be codified.

GOOD FAITH

One of the most important general principles of law is no doubt the principle of good faith. The Greco-Turkish Arbitral Tribunal (1926) considered it to be 'the foundation of all laws and all conventions'.¹⁹ Its applicability in international law can hardly be gainsaid, for, as the Permanent Court of Arbitration has said, good faith 'ought to govern international relations'.²⁰ Now it should not be difficult to formulate this principle of law in an international code. Indeed, such a codification has already been effected in the Bogotá Charter of 1948 between American States, Article 5 (c) of which provides that: 'Good faith shall govern the relations between States'.

In view of the multifarious and frequent application of the principle of good faith, it is perhaps possible to specify in greater detail the applications of this general principle of law in international law. One of the most important applications of the principle is no doubt in the domain of international conventions. The Permanent Court of Arbitration held in the *North Atlantic Coast Fisheries Case* (1910): 'Every State has to execute the obligations incurred by treaty bona fide'.²¹ This means that the contracting parties have to carry out their treaty obligations according to the spirit and not exclusively to the letter of the treaty, that is, according to what was the real and common intention of the parties.²² Parties can neither exact more nor

¹⁹ *Megalidis Case* (1928), *Recueil des Décisions des Tribunaux Arbitraux Mixtes* (hereinafter cited as *T.A.M.*), Vol. 8, p. 386, at p. 395.

²⁰ *Venezuelan Preferential Claims* (1904), *Hague Court Reports* (hereinafter cited as *H.C.R.*), Vol. 1, p. 55, at p. 60. See Charter of the United Nations, Art. 2, 2.

²¹ *H.C.R.*, Vol. 1, p. 143, at p. 167.

²² Cf. Permanent Court of Arbitration (PCA): *Island of Timor Case* (1914), *H.C.R.*, Vol. 1, p. 354, at p. 365. Harvard Researches (1935): Comment *ad* Art. 20 of Draft Convention on the Law of Treaties. (1935) 29 *American Journal of International Law*, Supplement, p. 987.

fulfil less than what were, or must reasonably have been, within their common contemplation.²³

Another important application of the principle of good faith in international law is in the domain of the exercise of rights. States have to exercise their rights in good faith; abuse of rights will not be protected.²⁴ Hence, it may be possible to elaborate the general provision, 'Good faith shall govern the relations between States' by providing that: 'In particular, every State shall fulfil its obligations and exercise its rights in good faith'.²

There remain many other applications of the principle of good faith in international law. For instance, in accordance with the principle of good faith, a State, under certain circumstances, may be under an obligation to maintain the *status quo*. Thus 'it is a principle of law that already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the treaty by reducing the importance of its provisions'.²⁵ This does not mean that treaties subject to ratification should be deemed to come into force as soon as they are signed, nor that there is an obligation upon the State to ratify all treaties it has signed. It indicates that while there is an intention to ratify the treaty, or if a party eventually ratifies a treaty, during the period while the treaty is awaiting ratification, the signatory State should do nothing to prejudice the legitimate expectations of the other party or parties which have ratified or intend to ratify the treaty, on the assumption that the state of things would remain as it was at the moment of signature. A similar duty incumbent upon States to maintain the *status quo* has been defined by the Permanent Court of International Justice as follows: 'Parties

²³ Cf. Report of Law Officers of the Crown, February 24, 1872, quoted in McNair, *Treaties*, p. 191.

²⁴ PCIJ: *German Interests Case* (1926), A.7, p. 30. *Free Zones Case* (1930, 1932), A.24, p. 12; A/B.46, p. 167. *I.C.J. Reports 1947-1948*, pp. 63, 69, 71, 79 *et seq.*, 91, 92, 93, 103, 115. *I.C.J. Reports 1949*, pp. 46, 47 *et seq.*, 75, 129 *et seq.* *I.C.J. Reports 1950*, pp. 14 *et seq.*, 29, 349.

²⁵ *Megalidis Case* (1928), *loc. cit.*, at p. 395. See also Amer.-Brit.Cl.Com. (1868): *Torres Case*, Moore, *Int.Arb.*, Vol. 4, p. 3798, at p. 3801. Cf. Harvard Researches (1935), Art. 9 of Draft Convention on the Law of Treaties and Comment thereon, *op. cit.*, pp. 778-787. The draft, to a certain extent, shares the usual confusion between the coming into force of a treaty and the obligation incumbent upon signatories of a treaty awaiting ratification. The above-mentioned cases show that the obligation to abstain from acts of bad faith is not 'purely moral and non-legal', but legal.

to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute'.²⁶ Specific applications of the principle, such as those mentioned above, may be advantageously left to the special field to which they belong, namely, the law of treaties and the law of judicial procedure.²⁷

It is possible to give further instances of the application of the general principle of good faith, and to particularise the conditions of application of each of the instances mentioned above. But it seems desirable, at the present stage of international law, once the general principle has been expressly acknowledged, to leave the task of 'concretisation' to the gradual practice of States and the development by international jurisprudence.²⁸

RESPONSIBILITY

A second category of general principles of law relates to the concept of responsibility. As pointed out by the Permanent Court of Arbitration, there exists a concept of responsibility in the very notion of law, a unitary concept, originating from fault and ending in reparation.²⁹ The legal concept of responsibility covers only the case of breaches of legal obligations and their consequences in law. It includes neither the case of an obligation assumed voluntarily,³⁰ nor the case of an obligation imposed by the law independently of any unlawful act.³¹ Four fundamental principles are inherent in this concept of responsibility.

First the principle of fault. The applicability of this general principle in international law was already admitted in the case

²⁶ PCIJ: *Electricity Co. of Sofia and Bulgaria* (1939), A/B.79, p. 199. See also A/B.48, pp. 287 *et seq.*

²⁷ See *infra*, p. 49.

²⁸ One may mention, *e.g.*, the principles *allegans contraria non est audiendus*, *nullus commodum capere de sua injuria propria* and *fraus omnia corrumpit*, but, if one limits one's self to the *lex lata*, it may often be difficult to determine the exact scope of their application in a general and abstract formula.

²⁹ *Russian Indemnity Case* (1912), *H.C.R.*, Vol. 1, p. 532, at p. 543. The original French text of the award is used.

³⁰ *E.g.*, where a State assumes by treaty an obligation to grant *ex gratia* indemnity to foreign nationals.

³¹ *E.g.*, the rule of international law which imposes an obligation upon the State to grant indemnity to foreigners, even though the State has not failed in its duty to protect them, for damage caused by rioters, unsuccessful revolutionaries, etc., if the State grants indemnity to its own nationals.

of the 'Jamaica' (1798).³² It was reaffirmed in the *Prats* (c. 1868),³³ the *Russian Indemnity* (1912),³⁴ and other international cases. Fault, it should be observed, is here used not in any subjective sense of malice or negligence—which are not by themselves the prerequisites of responsibility—but simply to signify the failure to carry out an obligation.³⁵ Every failure to carry out an obligation constitutes a fault, incurring responsibility, unless the failure be due to *vis major*.³⁶ In face of *vis major* all obligations disappear: *ad impossibile nemo tenetur*.³⁷ In such circumstances there is no breach of obligation, no fault, and therefore no responsibility.³⁸

Secondly, the principle of individual responsibility. This general principle of law is exemplified by the *Paula Mendel* (1926),³⁹ the *Sambiaggio* (c. 1903)⁴⁰ and other cases. The purport of this tenet is that an individual or a State, under whatever system of law, is responsible, in principle, only for his or its own acts or the acts of his or its agents, and not for the independent acts of a third party.

Thirdly, the principle of integral reparation. This general principle, which seems to be well established in international practice and, in particular, in the decisions of arbitral tribunals, has been so admirably explained by the Permanent Court of International Justice in the *Chorzów Factory Case* (1928),⁴¹ that there is no need to amplify it here.⁴²

Fourthly, as a complement to the principle of integral reparation, is the principle of proximate or effective causality: *in iure causa proxima non remota inspicitur*. This principle, expressly affirmed *inter alia* by the American-British Claims Tribunal

³² Moore: *International Adjudications, Modern Series* (hereinafter cited as *Int.Adj.*), Vol. 4, p. 489, at pp. 497-499.

³³ Amer.-Mexican Cl.Com. (1868). Moore, *Int.Arb.*, Vol. 3, p. 2886, at p. 2895.

³⁴ *H.C.R.*, Vol. 1, p. 532, at p. 543.

³⁵ See especially *Russian Indemnity Case* (1912). *Ibid.*

³⁶ *Russian Indemnity Case* (1912), *loc. cit.*, at p. 546.

³⁷ *Prats Case* (c. 1868), *loc. cit.*, at p. 2894.

³⁸ *Ibid.*, at p. 2895.

³⁹ Amer.-German Mixed Cl.Com. (1922), *Decisions and Opinions*, p. 772, at p. 793. See also pp. 780-781.

⁴⁰ Ital.-Ven. Mixed Cl.Com. (1903), *Ven.Arb.*, p. 666, at p. 680.

⁴¹ A.17, p. 47.

⁴² See *infra*, pp. 45-46.

(1910)⁴³ and the Portugo-German Arbitral Tribunal (1919)⁴⁴ is well explained and well illustrated by a number of cases decided by the American-German Mixed Claims Commission (1922).⁴⁵

The four general principles of law enumerated above, which have been repeatedly treated by international tribunals as common to all legal systems and, hence, applicable to international legal relations, can be said to cover all the essential aspects of the concept of responsibility. The essence of responsibility, as covered by those principles, is that every one, whether a State or an individual, is obliged to make good integrally, any damage caused to another which is the proximate result of an act which one has committed in violation of any of one's obligations, and, as a corollary thereof, every one is entitled to integral reparation for any injury one may suffer from another in violation of one's rights. Responsibility is, therefore, by compelling *restitutio in integrum* in case of any unlawful disturbance of the legal *status quo*, the corner stone of every legal system. By requiring the restoration to every man what is legally his due, and of which he has been unlawfully deprived, it is also the embodiment of justice.

Would it be possible to codify the above mentioned general principles of law? The Third Committee of the League of Nations Codification Conference, which failed so utterly in its attempt to codify the law of responsibility with regard to damage caused to the person or property of aliens, did succeed in reaching agreement on the following two provisions, in one case unanimously, in the other with an overwhelming majority: (1) 'A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State'.⁴⁶ (2) 'Responsibility involves for the State concerned an obligation to make good the damage suffered, in so far as it results from failure to comply with the international obligation'.⁴⁷ These two provisions are almost an exact embodiment of the four general principles of law in the legal concept of

⁴³ The '*Newchwang*' (1921), Nielsen's *Report*, p. 411, at p. 419.

⁴⁴ Award 1 (1928) *United Nations Reports of International Arbitral Awards* (hereinafter cited as *U.N.R.I.A.A.*), Vol. 2, p. 1011, at p. 1031.

⁴⁵ E.g., *Administrative Decision No. 2* (1923), *Decisions and Opinions*, pp. 5-15. *War Risk Insurance Premium Claims* (1923), *ibid.*, pp. 33-59.

⁴⁶ *Acts of Conference*, Vol. 4, pp. 30, 213.

⁴⁷ *Ibid.*, pp. 141-142.

responsibility. To say that a State is responsible for any failure to carry out its obligations is to affirm the principle of fault, while to limit that responsibility to failure on the part of the organs of the State is to affirm the principle of individual responsibility. The second provision is an expression of the principle of reparation and the principle of causality.

In order to take into account the effect of *vis major*, and the requirements of integrality in reparation, and of proximity in causation, only slight modifications to the above formulations will be required.⁴⁸ The following formulæ may, therefore, be suggested: (1) 'A State is responsible for any failure on the part of its organs to carry out the international obligations of the State, unless the failure be due to *vis major*'. (2) 'Responsibility involves for the State concerned an obligation to make good integrally the damage caused, in so far as it results proximately from failure to comply with the international obligation'.

Here, too, it seems possible to elaborate the two basic provisions by defining the meaning of *vis major*, the conditions of its admissibility, the extent of integral reparation and the criteria of proximate causality. The following suggestions, which are formulated on the basis of international judicial decisions, may be offered.

After the first part of the general provision, stated (1) above, it may be possible to add: '*Vis major*, in order to liberate the obligated State, must be of such a nature as to put the latter in an impossibility to fulfil the obligation incumbent upon it, and this impossibility must not be imputable to the obligated State itself'.⁴⁹ Similarly, it may be possible to add, after (2) above: 'Wherever possible; restitution in kind shall be made. If this is not possible, a sum corresponding to the value which a restitution in kind would bear shall be made. Whenever restitution in kind or payment in place of it does not cover all the loss sustained, damages shall be paid so that the injured party may be

⁴⁸ In a general codification, there seems also no reason to limit the provision to the case of responsibility for damage caused to the person or property of foreigners. Nor should it even be limited to responsibility towards foreign States and their nationals, since a State may have obligations towards an international institution and may consequently incur responsibility towards it. See e.g., *Reparation for Injuries Suffered in the Service of the United Nations* (1949), I.C.J. Reports 1949, p. 174 *et seq.*

⁴⁹ See *Macri Case* (1928), T.A.M., Vol. 7, p. 981, at pp. 982-983, 983-984. *Franz Case* (1922), T.A.M., Vol. 1, p. 781, at p. 785.

made whole.⁵⁰ The damage suffered shall be deemed the proximate result of an act if it is the normal and natural consequence thereof,⁵¹ or if it would have been foreseen by any reasonable man in the position of the author of the act,⁵² or if it were the intended result of the act'.⁵³

If the above provisions were adopted a constructive step would have been taken towards the goal of a universal international code.

PREScription

Another general principle of law, the codification of which may be usefully considered is the principle of prescription. In this matter, as the Secretary-General of the United Nations pointed out in a memorandum to the International Law Commission,⁵⁴ one needs perhaps reconsider the decision of the League of Nations Committee of Experts, reached by a majority vote at its fourth session, that extinctive prescription does not form part of international law and need not, therefore, be considered as a subject for codification.⁵⁵ The following opinion of Commissioner Little in the *Williams Case* is not only still apposite, but is also illustrative of the use of general principles of law in international law. He said: 'The opposition (perhaps as strenuous now as at any former period) to international prescription among modern writers . . . seems to us to arise in good measure from confusion of terms, and to be therefore largely apparent, rather than real. In other words, the difference between the two schools, as we conceive, partly at least, "lies in the terms". Prescription is confounded with limitation. . . . They are always distinct. The former relates to substance, is the same in all jurisdictions, and

⁵⁰ See PCIJ: *Chorzów Factory Case* (1928), A.17, p. 47.

⁵¹ See Amer.-Germ. M.C.C. (1922): *Life-Insurance Claims* (1924), *Decisions and Opinions*, p. 103, at pp. 133-134. *J. A. Beha Case* (1928), *ibid.*, p. 901, at pp. 902-903. *S. G. Antipha Case* (1926), *T.A.M.*, Vol. 7, p. 23, at p. 28.

⁵² See Hurst-Crane Joint Report No. 2 of August 12, 1904, *loc. cit.* Portugo-German Arbitration, Award 2 (1930), *U.N.R.I.A.A.*, Vol. 2, p. 1037, at p. 1075.

⁵³ See *Dix Case*, *Ven.Arb.*, p. 7, at p. 9.

⁵⁴ *Survey of International Law*, 1949, A/CN.4/1/Rev.1, p. 57.

⁵⁵ Minutes of the 4th Session, 1928, pp. 18-22. See, also, pp. 47, 48. Cf. also ILC, 2nd Session, Report on Arbitration Procedure, A/CN.4/18, para. 75. The cases herein cited show that, contrary to the opinion of the learned *rapporteur*, the principle has often been invoked and applied in international adjudications, and is, therefore, not one of mere theoretical or academic interest.

aims at justice in every case, while the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Prescription was recognised when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the State acting for its citizens. . . . It is this prescription which underlies, varies from, antedates and, as Phillimore says, forms the model for municipal limitation regulations that the writers asserting the existence of the doctrine in the international law refer to and treat of'.⁵⁶

General principles of law recognised by civilised nations are indeed the *ensemble* of those general principles which underlie, antedate, vary from, and form the model of municipal rules of law, which are the same in all jurisdictions and aim at justice in every case. They are a necessary part of international law. Prescription is one among the many general principles of law.

In the light of international jurisprudence,⁵⁷ the general principle of extinctive prescription may be thus formulated: 'Any claim of one State against another shall be deemed ⁵⁸ invalid

⁵⁶ Amer.-Ven.Cl.Com. (1885), Moore, *Int.Arb.*, Vol. 4, p. 4181, at pp. 4190-4194.

⁵⁷ E.g., *Cardiz Case* (c. 1885), Moore, *Int.Arb.*, Vol. 4, pp. 4199-4203. *Spader Case*, *Ven.Arb.*, pp. 161-162. *Gentini Case*, *Ven.Arb.*, pp. 720-730. *Tagliaferro Case*, *Ven.Arb.*, pp. 764-765. *Giacopini Case*, *Ven.Arb.*, pp. 765-767. *Sarropoulos Case* (1927), *T.A.M.*, Vol. 7, pp. 47-55. Amer.-Mexican Gen.Cl.Com. (1923): *G. W. Cook Case* (1927), *Opinions of Commissioners*, 1927, pp. 318-324. Upon a careful reading of the *Cook Case*, I cannot share Professor Lauterpacht's interpretation (*Function of Law*, pp. 93-94) that it denied prescription in international law. It correctly said that 'there is, of course, no rule of international law' of the character of a municipal statute of limitation, but it was referring to the principle of prescription when it spoke of 'a well recognised principle of international practice'. See *Williams Case*, quoted in text. See, also, *Gentini Case*, *loc. cit.*, p. 725, for the distinction between the municipal rule of limitation and the general principle of prescription, which case also explains the *Pious Fund Case* (1902), *H.C.R.*, Vol. 1, pp. 1 *et seq.*

⁵⁸ See *Williams Case*, *loc. cit.*, at pp. 4192, 4196.

if the claimant State⁵⁹ has, by its own negligence,⁶⁰ delayed the presentation⁶¹ of the claim for so long that, as a result thereof, it is to be feared that there would be danger of mistaking the truth'.⁶²

JUDICIAL PROCEEDINGS

Turning now to another field, one finds that there are a number of general principles of law in the concept of judicial proceedings which may perhaps be codified. Some of them have already found expression in existing treaties or draft conventions. For the sake of brevity they may be enumerated as follows :

(1) 'Every tribunal has the power, in the first place, to determine the extent of its jurisdiction,⁶³ unless there are express provisions to the contrary'.⁶⁴

(2) 'The jurisdiction of a tribunal extends to all relevant points incidental to the principal question over which it is competent, unless there are express provisions to the contrary'.⁶⁵

(3) 'Parties to a dispute are disqualified from acting as its judges or arbitrators'.⁶⁶

⁵⁹ See *Williams Case, loc. cit.*, at p. 4196. *Roberts Case, Ven.Arb.*, p. 142, at p. 144. *Cook Case, loc. cit.*, p. 319.

⁶⁰ 'Abandoned or neglected property or rights only are prescriptible', *Williams Case, loc. cit.*, p. 4195. *Gentini Case, loc. cit.*, p. 727.

⁶¹ 'The presentation of a claim to the competent authority within proper time will interrupt the running of prescription', *Gentini Case, loc. cit.*, p. 730.

⁶² See *Williams Case, loc. cit.*, pp. 4196, 4197-4198. Cf. *Tagliaferro Case* and *Giacopini Case, loc. cit.*

⁶³ See PCIJ: Advisory Opinion No. 16, B.16, p. 20. 'The Betsey' (1797), Moore, *Int.Adj.*, Vol. 4, pp. 82-87, pp. 179-290. Amer.-Germ. M.C.C. (1922): *Lehigh Valley Rld. Co.* (1923), *Decisions and Opinions*, pp. 1084-1128, at p. 1122. Amer.-Brit. Cl.Arb. (1910): *Rio Grande* (1923), Nielsen's *Report*, p. 332, at p. 342. *Flutie Case, Ven.Arb.*, p. 38, at p. 41. Cf. Statute of the PCIJ, Art. 36, para. 4. Statute of the ICJ, Art. 36, 6. Hague Convention, 1907, Art. 73.

⁶⁴ See *Rio Grande Case* (1923), *loc. cit.*

⁶⁵ See *Cie. pour la Construction du Chemin de Fer* (1926), *T.A.M.*, Vol. 6, p. 505, at p. 507. *Kunkel et al.* (1925), *T.A.M.*, Vol. 6, p. 974, at p. 977. PCIJ: A.2, p. 28; A.6., p. 18; A.7, pp. 25, 42.

⁶⁶ *Nemo debet esse iudex in propria sua causa*. See PCIJ: Advisory Opinion No. 12, B.12, p. 32. The British Government declined to act as arbitrator between Spain and the U.S. in the dispute arising out of the 'Virginus' Incident (1873), Despatch by Earl Granville to the British Minister in Spain, November 17, 1873, *State Papers*, Vol. 65, pp. 103-104. This provision disqualifies only the organs of the State from acting as judge or arbitrator, but not the nationals of that State acting in an individual capacity. Cf. 7th Universal Peace Congress (1896), Declaration of Principles of International Law, Art. 2. Inter-Parliamentary Union, Declaration of the Rights and Duties of States (1928), Art. 6.

(4) 'Where a judge or arbitrator is the national of, or has been selected by, one of the parties to the dispute before the tribunal, he shall not consider himself a representative of that party, but must decide the case submitted to him impartially, without fear or favour'.⁶⁷

(5) 'In judicial proceedings the tribunal shall ensure that both parties have adequate and equal opportunity to be heard'.⁶⁸

(6) 'The above provision shall not prejudice the right of the tribunal to decide by default, if one of the parties, without valid reason, does not appear before the tribunal, or fails to defend his case. In doing so the tribunal must decide, after satisfying itself that it has jurisdiction, according to the merits of the case'.⁶⁹

(7) 'Within the limits of its jurisdiction the tribunal shall examine points of law *proprio motu*, without being bound by the arguments of the parties'.⁷⁰

(8) 'Parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute'.⁷¹

⁶⁷ See Opinions of Commissioner Gore in the '*Betsey*' (1797), Moore, *Int.Adj.*, Vol. 4, p. 179, at p. 191; Commissioner Hassureck in the '*Medea*' and '*Good Return*' (c. 1862), Moore, *Int.Arb.*, Vol. 3, pp. 2733-2734; Commissioner Wadsworth in *McKenny Case* (c. 1868), Moore, *Int.Arb.*, Vol. 3, p. 2881, at pp. 2883-2884. In view of the above precedents, and others which may be cited in support of the principle formulated in the text, it seems unnecessary to comment on the following statement made by a learned member of the ILC during its second session: 'According to the principle of arbitration, if an arbitrator were chosen by one of the parties and lost the confidence of that party, the latter was not bound by the award', A/CN.4/SR 73, para. 27 ii.

⁶⁸ *Audiatur et altera pars*. The awards of the Umpire of the Amer.-New Granadian Cl.Com. (1857) in the cases of the '*Medea*', the '*Good Return*', etc., were set aside *inter alia* for failure to observe this principle. See Moore, *Int.Arb.*, Vol. 2, pp. 1397-1412, at pp. 1401-1402. Cf. Hague Convention, 1907, Art. 19, para. 1. Another aspect of this principle is that the Tribunal has to afford the parties at all stages of the proceedings 'equal opportunity reciprocally to discuss their respective contentions' (PCIJ: A.23, p. 45). See authorities cited in Schwarzenberger, *International Law*, Vol. 1 (2nd ed.), pp. 424-425.

⁶⁹ See PCIJ: *Electricity Co. of Sofia and Bulgaria* (1940), A/B.80, pp. 8-9. ICJ: *Corfu Channel Case* (1949), *I.C.J. Reports* 1949, p. 237 *et seq.*; p. 244 *et seq.* Cf. Statute of the World Court, Art. 53. ILC, 2nd Session, Report on Arbitration Procedure, A/CN.4/18, para. 83.

⁷⁰ *Iura novit curia*. See PCIJ: *Brazilian Loans Case* (1929), A.20/21, p. 124. *Oder Commission Case* (1929), A.23, pp. 18-19. ICJ: *Corfu Channel Case* (1949), *I.C.J. Reports* 1949, p. 84. *M. Colleanu Case* (1929), *T.A.M.*, Vol. 9, p. 216, at p. 221.

⁷¹ PCIJ: *Electricity Co. of Sofia and Bulgaria* (1939), A/B.79, p. 199. See *supra*, pp. 41-42.

(9) 'The decision of an international tribunal is definite and obligatory only upon the parties to the dispute'.⁷²

(10) 'Any question which has been resolved by a valid and final decision may not be the subject of dispute again between the same parties'.⁷³

(11) 'Decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in another case'.⁷⁴

(12) 'A judgment may be annulled: (a) if the tribunal which rendered the judgment lacked jurisdiction or exceeded its jurisdiction'⁷⁵; (b) if the tribunal, or any member of the tribunal, which rendered the judgment, is proved guilty of fraud or corruption in connection with the case concerned'⁷⁶; or (c) if the

⁷² *Res iudicata*. 'Recognition of an award as *res iudicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory', PCIJ: *Sté. Commerciale de Belgique* (1939), A/B.78, p. 175. *Res inter alios iudicata aliis neque nocet neque prodest*. See British Guiana-Brazil Boundary Arbitration (1904), *State Papers*, Vol. 99, p. 930, at p. 931. Cf. Statute of the World Court, Art. 59. Hague Convention, 1907, Art. 84. ILC: A/CN.4/18, para. 92.

⁷³ *Exceptio rei iudicatae obstat, quotiens eadem quaestio inter easdem personas revocatur*. 'It is a well established rule of law that the doctrine of *res iudicata* applies only where there is identity of the parties and of the question at issue': The '*Newchwang*' (1921), Nielsen's *Report*, p. 411, at p. 415. See also PCIJ: B.11, p. 30. 'Question' is sometimes subdivided into 'object' and 'cause' in international law as well as in municipal law (cf. *Trail Smelter Case* (1941), 35 *American Journal of International Law*, p. 684, at p. 701). For reasons too long to elaborate here, it is believed that the criterion of 'question' is more correct. Cf. ILC, 2nd Session, Report on Arbitration Procedure, A/CN.4/18, para. 76. The number of cases where the principle has been raised and applied in international law leads us to disagree with the learned *rapporteur* that such cases are 'difficult to imagine'. See further *Machado Case* (1880), Moore *Int. Arb.*, Vol. 3, pp. 2193-2194. *Banque Meyer Case* (1923), *T.A.M.*, Vol. 3, pp. 639-642.

⁷⁴ PCIJ: A.13, p. 26, dissenting opinion by Judge Anzilotti. Cf. A.17, p. 76, dissenting opinion by Judge Ehrlich. Properly understood, the statement is compatible with the decision of the Court. The decision on incidental questions is not binding in another case, but is binding in so far as the actual judgment in which it is contained is concerned.

⁷⁵ *Extra compromisum arbiter nihil facere potest*. See the '*Betsey*' *Case* (1797), *loc. cit.*, pp. 193-194. French-Ven.M.C.C. (1903): *French Co. of Venezuelan Rld.* (1905), Ralston's *Report*, p. 367, at p. 444. PCA: *Orinoco S.S. Co.* (1910), *H.C.R.*, Vol. 1, p. 504, at pp. 505-506. *Tiedemann Case* (1926), *T.A.M.*, Vol. 7, p. 702, at p. 706. PCIJ: A.2, pp. 57-60, dissenting opinion by Moore.

⁷⁶ *Fraus omnia corrumpit*. Fraud was alleged against the American Commissioner on the Amer.-Ven.Cl.Com. (1866). When fraud was established the U.S. agreed in 1885 to the creation of the Claims Commission of Washington to re-examine all the claims. See Moore, *Int. Arb.*, Vol. 2, pp. 1659-1692.

tribunal failed to give adequate and equal opportunity to both parties to be heard'.⁷⁷

(13) 'A judgment may be revised: (a) for manifest and essential error⁷⁸; (b) for after-discovered evidence⁷⁹; or (c) for fraud of the parties or collusion of witnesses which has induced the tribunal into error'.⁸⁰

(14) 'A tribunal may annul or revise its own judgment, either *proprio motu*, or on application of one of the parties, on account of any of the causes provided for above, as long as it has jurisdiction over the case'.⁸¹

Among general principles of law connected with the concept of judicial proceedings, there are certain principles which it may not at present be expedient to codify. For instance, it has been held that: 'With respect to matters of evidence they [international tribunals] must give effect to common sense principles underlying rules of evidence in domestic law'.⁸² These principles can no doubt be ascertained and formulated. However, their utility depends not so much in any clear or precise formulation, but rather on a wisely combined application of those which are appropriate to the case and, ultimately, upon the acumen and the learning of the individual judge. Under such circumstances, it seems preferable, as it is wont in international judicial practice, merely to leave the matter to the entire discretion of the

⁷⁷ See *supra*, note 68.

⁷⁸ See *Trail Smelter Case* (1941), *loc. cit.*, p. 707. *Shreck Case* (1874), Moore, *Int.Arb.*, Vol. 2, pp. 1357-1358; Vol. 3, pp. 2450-2453. *Orinoco S.S. Co. Case* (1910), *loc. cit.*, p. 505. PCIJ: B.9, p. 21.

⁷⁹ See *Moore Case* (1871), Moore, *Int.Arb.*, Vol. 2, p. 1357. *Trail Smelter Case* (1941), *loc. cit.*, p. 707, note 1. Statute of the World Court, Art. 61. Hague Convention, 1907, Art. 83. Revision for after-discovered evidence was provided for in the Rules of Procedure of practically all the Mixed Arbitral Tribunals set up after the first World War, which tribunals also provided an abundance of decisions illustrating the application of these provisions. Cf. also ILC, 2nd Session, Report on Arbitration Procedure, A/CN.4/18, paras. 94-99.

⁸⁰ See Amer.-Germ.M.C.C. (1922): *Lehigh Valley Rld. Co. Case* (1930-1939), *Decisions and Opinions*, pp. 967-994, 1084-1177. *Opinions and Decisions in the Sabotage Claims*, 1940. Also, *La Abra Silver Mining Co. Case and Weil Case*, Moore, *Int.Arb.*, Vol. 2, pp. 1324-1348.

⁸¹ See *Tiedemann Case* (1926), *loc. cit.*, p. 706. *Trail Smelter Case* (1941), *loc. cit.*, p. 703. *Y. Smith & Co. Case* (c. 1871), Moore, *Int.Arb.*, Vol. 3, p. 2184, at p. 2186. Cf., however, Amer.-Germ.M.C.C. (1922), which held that, while it was competent to reopen a case for fraud or manifest error (*Decisions and Opinions*, p. 1127), it had no power to reopen for after-discovered evidence (*loc. cit.*, pp. 1125-1127).

⁸² Amer.-Mex.G.C.C. (1923): *Kling Case* (1930), *Opinions of Commissioners*, 1931, p. 36, at p. 45.

tribunal. As the umpire of the Franco-Mexican Mixed Claims Commission (1924) held in the *G. Pinson Case* (1928): 'In the matter of evidence, I consider . . . as fundamental, the complete freedom of the Franco-Mexican Commission in admitting any evidence which it deems fit and in determining its value'.⁸³

For different reasons, it would be equally inexpedient to codify at present another general principle, that is to say, the principle of self-preservation, of which the right of self-defence is perhaps the most important expression. In respect of this principle, the urgent matter today can hardly be, as it has been maintained, simply 'to proclaim the right of legitimate defence without further explanation or details of its implementation'.⁸⁴

In speaking of self-defence, one is apt to forget that it has many applications, under different conditions according to whether it is exercised in time of peace or in time of war, within the State's own territory, on the high seas, or in the territory of another State. Besides, the right of self-defence has not been subject to the same limitations throughout the history of international law. It has been held, for instance, that 'the right of legitimate defence . . . forms the basis of the rights of any belligerent nation'.⁸⁵ And it has also been held that 'international law as applied to warfare is a body' of limitations, and is not a body of grants of power'.⁸⁶ In other words, in their 'inherent' or 'natural'⁸⁷ state, the rights of a belligerent—which form only part of the right of self-defence—were unlimited, but are now subject to a body of restrictions known as the rules of warfare. The same should be true of the wider right of self-defence. To assert simply that every State *has* the 'inherent' right of self-defence is, therefore, if not juridically unsound, at least legislatively impolitic. Alternatively, to state that the right must be exercised in accordance with international law would be a pure *petitio principii*. Consequently, it is believed that this principle should only be codified in the wider framework of a general codification of international law.

⁸³ *Jurisprudence de la Commission*, p. 1 et seq., at p. 94.

⁸⁴ *Preparatory Study concerning a draft Declaration on the Rights and Duties of States*, p. 108.

⁸⁵ Amer.-Brit.Cl.Arb. (1910): *Eastern Extension, Australasia and China Telegraph Co. Case* (1923), Nielsen's Report, p. 40, at p. 76.

⁸⁶ *Cession of Vessels and Tugs for Navigation on the Danube* (1921), U.N.R.I.A.A., Vol. 1, p. 97 at p. 104.

⁸⁷ Cf. Chinese and French text of Art. 51 of the Charter of the United Nations.

What has been enumerated above are some of the most important general principles of law repeatedly treated as such by international courts and tribunals, and applied by them in numerous international adjudications. Except for a few, they appear susceptible of systematic and precise formulation and, hence, may properly be made a subject for international codification.⁸⁸ It is to be hoped that the modest attempt made here may stimulate further interest and exploration so that 'ultimately there may emerge universal agreement on the subject'.⁸⁹ Since these principles have been recognised by the generality, if not the totality, of municipal legal systems, it is also legitimate to hope that nations will not find it too difficult to reach an agreement, at least on the substance.

In the matter of international codification one should perhaps not underestimate the danger of failure to secure agreement, as people in some quarters appear to do.⁹⁰ Sir Cecil Hurst has warned us: 'A second failure would not only prevent any further efforts in the same direction, but it would render it almost impossible to persuade what we call the man in the street that international law is a legal system capable of constituting the foundation of the law and order on which the new world is to be based'.⁹¹ One may perhaps add that, in such an event, the international lawyer also would have to re-examine seriously whether, and if so to what extent, a universal international law really exists. At the same time, in view of the fact that these principles have been constantly applied in the settlement of international disputes, it is believed that the codification of general principles of law, in attempting to avoid the Scylla of failure, would not fall into the Charybdis of securing agreement by means of compromise or platitudes.⁹² If an agreement upon these principles could be reached, a firm footing would be secured, from which further steps at international codification would be facilitated, and part, at least, of the foundation of the future *Corpus Iuris Inter Gentes* would have been laid.

⁸⁸ Cf. Art. 15 of the Statute of the ILC.

⁸⁹ Hurst, *op. cit.*, p. 132.

⁹⁰ Cf. *supra*, note 6.

⁹¹ Hurst, *op. cit.*, p. 135.

⁹² Cf. *Survey of International Law*, A/CN.4/1/Rcv.1, pp. 8-9, 63.

THE CONTINENTAL SHELF

L. C. GREEN

DURING the academic year which has witnessed the eightieth birthday of one of the greatest living English exponents of international law, it is apposite for the international law school of University College, London, to pay tribute to his work. Practically every article that one cares to read relating to the assertion of claims over the continental shelf and the exploitation of the resources of the sea-bed, bases itself to a greater or lesser extent on an article written by Sir Cecil Hurst in 1923. Sir Cecil called this article 'Whose is the Bed of the Sea?' and gave it the sub-title 'Sedentary Fisheries Outside the Three-Mile Limit'.¹ Twenty-five years later, in 1948, he read a paper to the Grotius Society on 'The Continental Shelf',² in which he indirectly reprimanded those who quoted the 1923 article. He pointed out that he did not consider his arguments concerning the ownership of submarine banks outside territorial waters as being applicable to the continental shelf. As a matter of interest it is worth citing the reasons Sir Cecil gives for this differentiation: 'The first is the magnitude of the areas of the continental shelf as compared with the small extent of the banks or beds where these sedentary fisheries exist; the second is the variety of resources capable of being obtained from those submarine areas; and the third is the impossibility of obtaining some of them without the erection of installations which would be a serious hindrance to navigation'.³

It is the variety of resources which constitutes Sir Cecil's second reason that has led to the recent increase of interest in exploitation of the continental shelf which, it seems, is rich in oil and perhaps even in uranium. In fact, it would often be of value if one were able to ascertain the economic interest—or

¹ Hurst, *International Law. The Collected Papers of Sir Cecil J. B. Hurst*, 1950, p. 51.

² *Ibid.*, p. 152.

³ *Ibid.*, p. 164.

should it be oil company?—on behalf of which particular lawyers interested in this matter have put their pens to paper. Thus Professor Bingham, in his article on 'The Continental Shelf and the Marginal Belt',⁴ contends that there is no reason why the United States should not be able to assume jurisdiction and control over some 750,000 square miles of what was formerly regarded by the rest of the world as high sea. In its Reply to the Questionnaire sent out by the International Law Commission, however, the United States stated that its territorial waters only extend three miles.⁵ In another capacity, this time not as an academic writer, but as one of the panel of lawyers briefed on behalf of the State of Texas in its dispute with the United States concerning ownership of the marginal seas,⁶ Professor Bingham seems to concur in the recognition of a maritime territorial limit, albeit of three leagues and not three miles: 'No matter what the United States may gain in this case by a holding that the Texas marginal sea is "international domain" (and thus within the federal competence) such gain could be far outweighed by the consequent gratuity to other nations. Implicit in the determination of the area as "international domain" is the possibility of other nations having rights therein other than innocent passage through the waters. Spain, Mexico, France, England, Russia and the other nations can make no reasonable assertion of an interest in the oil and other minerals within the three-league Gulfward boundary of Texas so long as this court recognises that the area was removed from international domain when it became a part of the Republic of Texas. . . . A contrary conclusion by the United States Supreme Court could well be used by other nations as an opening for claims not now asserted'.⁷ Here Professor Bingham is concurring in an opinion which impliedly recognises that at least beyond the three-league Gulfward boundary all nations have equal rights, and which suggests that if, as between Texas and the federal government, the Supreme Court finds for the latter, such rights might also be enjoyed even within that limit.

⁴ (1946) 40 *American Journal of International Law*, p. 173 *et seq.*

⁵ *Replies from Governments to Questionnaires of the International Law Commission*, 1950, U.N. Doc. A/CN. 4/19, p. 104. See also *U.S. v. California* (1947) 332 U.S. 19, at pp. 32, 33, 34.

⁶ *U.S. v. Texas* (1950) 339 U.S. 707.

⁷ Daniel, *Sovereignty and Ownership in the Marginal Sea*, 1950, Joint Memorandum of Ten Counsel, p. 77, at p. 83.

This reference to the dispute between Texas and the United States makes it necessary to point out that in this paper we are not concerned with theoretical discussions on the feasibility of acquiring ownership of the sea-bed, nor with disputes between the United States and its constituent members as to which owns the sea-bed underlying territorial waters and the right to exploit oil and other resources present therein.⁸ It seems to be well established that ownership of the sea-bed is possible within territorial waters. It would be a waste of time to emulate the Attorney-General of Texas, who has gone to the trouble of compiling a list of 196 references, starting with Chief Justice Hale in 1670 and finishing with Dr. Schwarzenberger in 1949, to prove that a State can own maritime as well as land territory.⁹ We are interested only in that part of the continental shelf which lies outside territorial waters. There seems, therefore, little point in marching with the Attorney-General and arguing from the lesser to the greater. It is difficult to appreciate the legal ground underlying an argument which runs as follows: 'We have seen that inside territorial waters private ownership of portions of the continental shelf have been held and enjoyed by individuals who have no control or sovereignty over the waters. This has been without interference with public rights governed by municipal law or rights of innocent passage governed by international law. From this experience is it not conceivable that individual states may enjoy similar ownership and control of those portions of the continental shelf which lie beyond territorial waters without having sovereignty over or control of the overlying waters of the high seas?'¹⁰ While it may be possible to own only the non-maritime part of the continental shelf, that is to say the sea-bed and its subsoil, the whole suggestion is based on a *non sequitur*. The fact that the subsoil of the territorial portions of the continental shelf is subject to ownership means nothing with regard to the extra-territorial portions. In connection with this statement by Mr. Daniel, it should be pointed out that under English law individuals can enjoy exclusive rights in territorial waters only to a limited extent. According to the common law, English tidal waters belong to the Crown and by Magna Carta the Crown is

⁸ See, for example, *U.S. v. California* (1947) 332 U.S. 19; *U.S. v. Louisiana* (1950) 339 U.S. 699; *U.S. v. Texas* (1950) 339 U.S. 707.

⁹ *Op. cit.*, n. 7 above, pp. 25-69.

¹⁰ *Ibid.*, pp. 11-12.

precluded from granting a 'several Fishery' to a subject, that is to say, the exclusive right to fish in such waters, territorial or inland, below low-water mark.¹¹

Before proceeding further it would perhaps be useful to explain what is meant by the term 'continental shelf'. This expression was first used by the geographer H. R. Mill in his *Realm of Nature*, published in 1897. Apparently it is a geological fact that continental land-masses do not terminate abruptly at the sea-shore, nor always at a reasonable distance therefrom. Frequently the sea-bed tapers off gradually and represents a continuation of the continent which in former ages was above the level of the sea—the Attorney-General of Texas argues the other way; he maintains that much of the present land territory of that State was formerly submerged, and he contends that much of what is now submerged will in the future be dry ground.¹² The various geographical and geological reference books suggest that this continental continuation extends under the ocean, generally speaking, as far as the 100-fathom line, at which depth the continental land-mass tends to fall away abruptly. In exceptional circumstances it may well be that the continental shelf extends beyond such a depth. This fact would not, however, justify a claim to sovereignty over a continental shelf—assuming such claims were possible in international law—at whatever depth below the sea, a claim put forward by Chile in June, 1947.¹³ The various national claims that have been made to the continental shelf will be discussed later. Here it is sufficient to point out that, like 'Greenland',¹⁴ the term 'continental shelf' is technical in character and has, *prima facie*, to be interpreted in its usual meaning. Any attempt to introduce, as Chile appears to have done, a peculiar and special meaning would require clear and unequivocal proof.

The term 'continental shelf' first came to the attention of a conference at the National Fishery Congress, Madrid, 1916, when de Buren, later the Director-General of Fisheries in Spain, urged

¹¹ Cap. 47. See also *Gann v. Free Fishers of Whitstable* (1865) 11 H.L.C. 192; Callis, *The Reading of the Famous and Learned Robert Callis upon the Statute of Sewers*, 1622, cited Fulton, *The Sovereignty of the Sea*, 1911, p. 363; and Hurst, *op. cit.*, pp. 53-54.

¹² *Op. cit.*, n. 7, above, p. 5.

¹³ (1948) 2 *International Law Quarterly*, p. 135.

¹⁴ *The Legal Status of Eastern Greenland* (1933), P.C.I.J., Series A/B 53, pp. 49, 52.

the necessity of extending territorial waters to include 'the whole of the continental shelf'.¹⁵ Nothing came of this at the time, but in 1947 Texas passed such a statute,¹⁶ which, in *U.S. v. Texas* (1950), was held to infringe the rights of the United States. The first reference to the continental shelf in a State instrument appeared in a Russian imperial note circulated to the powers in the same year, 1916, a note which was reissued by the Soviet Union in 1924.¹⁷ According to this Russia claimed as an integral part of its empire certain islands, both named and otherwise, 'situated close to the Asiatic shore of the Empire (which) form a northward extension of the continental platform of Siberia'. The English translation of the 1924 note talks of 'the northern continuation of the tableland of the Siberian mainland'. Of these notes Professor François, in his *Report on the High Seas* to the International Law Commission, says the 'term "continental platform" is clearly not used in the same sense as that employed today: it does not refer to an under-water plateau. The rights claimed by the Soviet Union in polar waters should . . . be considered in relation to the "theory of sectors" . . . The Soviet Government has not submitted any claims on the basis of the "continental shelf" theory nor has it replied to the claims of other States'.¹⁸ All that need be said of the sector theory is that it has about as much validity in international law as has the more blatantly political concept of spheres of influence. If Professor François's interpretation of the Russian edict is correct—and there seems no reason to dispute it, particularly in the light of statements quoted in the United Nations Secretariat's *Memorandum on the Soviet Doctrine and Practice with respect to the Regime of the High Seas*¹⁹—it would mean that the continental shelf theory did not appear in State documents until the United States proclamations of September, 1945. In 1925, however, Ceylon issued a Pearl Fisheries Ordinance which made no actual reference to the continental shelf, but defined the 'pearl banks'

¹⁵ *Report of Committee of Experts for the Progressive Codification of International Law*, 1927, League of Nations Doc. L.N. C. 196, M. 70, 1927, v, p. 63.

¹⁶ L. Texas, 50th Leg., p. 457.

¹⁷ French translation in Lakhtine, *Rights over the Arctic*, 1928, pp. 43-45 and Appendix. An English translation of the 1924 note appears in J. Degras, *Soviet Documents on Foreign Policy*, 1951, p. 476.

¹⁸ 1950, U.N. Doc. A/CN.4/17, p. 34.

¹⁹ 1950, U.N. Doc. A/CN.4/38, pp. 5-6.

as a 'determinate area between the three- or in some places five-fathom line and the 100-fathom line',²⁰

It should not be thought that because references to the continental shelf are of recent date, the problems involved in what may be described as the legal theory of the continental shelf are of similar modernity. As we have seen, this is merely a convenient way to limit geographically problems concerned with the sea-bed and its subsoil. For our purpose, in fact, there is no need to ponder over the artificial jurisprudential distinctions between the surface of the sea-bed and what lies beneath it, and in the 1942 Treaty concerning the Gulf of Paria the terms are used indiscriminately.²¹ Nor do we need to consider whether, like the sea, this 'land' is *res communis*, or, like Antarctica and other unoccupied and unadministered places, *res nullius*. This problem of classification will solve itself in favour of the latter if it can be shown that States consider it amenable to jurisdiction and subjection to control and sovereignty.

At the present day serious problems are involved—or at least so we are told—in the erection of derricks on the sea-bed and the sinking of oil wells through the sea-bed into the subsoil beneath, which, so it is alleged, involve an entirely new development and a new problem. Too often we are told by politico-lawyers that a situation is *sui generis* requiring law to be made *de novo*, and this is the constant cry in connection with this problem, for, it is alleged, the existing rules of international law with respect to territorial waters, the high seas and the occupation of territory only hamper scientific development—frequently synonymous with economic exploitation—and if they are insisted upon, must result in bringing the law into contempt and disregard. Thus, Professors Clark and Renner, writing in the *Saturday Evening Post*, have described the United States proclamations 'as one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny'²²; while Professor Bingham, in the article already quoted, has given vent to what can only be described as ecstatic raptures: 'These proclamations are a promising contribution to a better statesmanship which will serve the interests of a world order designed for

²⁰ Ordinance No. 2, cited in Riesenfeld, *Protection of Coastal Fisheries under International Law*, 1942, p. 169.

²¹ Treaty Series No. 10 (1942); Cmd. 6400 (1942).

²² April 4, 1946.

peace and the mutual co-operation of peoples. They thus will contribute also to the development of a democratic international law'—whatever that may be—'supporting the just claims of small States as well as large and increasing the chances of peace. This democratic law will develop through like fresh appraisals of the competitive forces and varying conditions in our world today, instead of through mechanistic adherence to traditional ill-digested generalities and slogans devised by theoreticians of an unscientific age of subsidised piracy, matchlocks, wood fires and candle-lights, wide-open spaces and glorification of cruel aggressive force for selfish profit—theoreticians who could have foreseen little of the technology, industries, social pressures and dominant impulses of our crowded, complex, modern civilisation'.²³ Similar arguments have been brought forward in every age and especially in every war, particularly if new weapons are used. The attention of such politico-lawyers might be drawn to the dissenting judgment of Judge Azevedo in the *Asylum Case*, in the course of which he warned against disregarding 'the manner in which a legal institution has become adapted to the social conditions existing in a certain part of the world',²⁴ and, one might add, at a certain period of history and in a certain stage of scientific development. Evidence of this is to be found in the development of the doctrine of territorial waters and the discarding of that of national seas.

ARTIFICIAL ISLANDS

That problems concerning the ownership of the sea-bed were known to the ancients is clear from the *Digest*. Here we read that if an artificial island is created in the sea or piles sunk and a building erected thereon, such island or building—and presumably the piles—would belong to the first occupant.²⁵

There seems little difference between piles with a building and piles with an oil derrick, but one's first reaction to the idea of an artificial island may well be ridicule. Such a reaction would be completely out of place, for in 1918 an American citizen, believing that oil lay at the bottom of the Gulf of Mexico at a point about forty miles from the nearest land, on a

²³ *Op. cit.*, n. 4 above, p. 178.

²⁴ *I.C.J. Reports 1950*, p. 266, at p. 332.

²⁵ D. 41, 1, 30, 4. See also Grotius, *De Jure Praedae Commentarius*, Carnegie translation, 1950, pp. 233-234.

reef where the water was less than 100 feet deep, that is to say well within the limits of the continental shelf, wrote to the State Department inquiring whether he could acquire leasehold or property rights over the relevant portion of the sea-bed so as to be protected in his efforts to exploit the oil. He then suggested that an artificial island might be erected and inquired whether it might be brought under the jurisdiction of the United States, which might protect his rights by granting him a lease of the island. The reply of the State Department was most forthright: 'The United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast. Therefore, it does not appear possible for the United States to grant to you the leasehold or other property rights in the ocean bottom which you desire. . . . Unless the erection of the artificial island interfered with the rights of the United States or of its citizens, or formed the subject of a complaint made upon apparently good grounds by a foreign government, it is not likely that this Government would object to the erection by American citizens of such an island as you suggest'.²⁶ This statement suggests that, in 1918 at least, the United States recognised the extra-territorial stretches of the bed of the Gulf of Mexico as *res nullius* and amenable to occupation, and should be borne carefully in mind in any consideration of the 1945 Presidential Proclamations.

Until comparatively recent years the need to acquire oil was not the pressing consideration that it is today and, formerly, problems of the sea-bed were confined to under-oceanic tunnels and sedentary fisheries. In fact, as we have already seen, Sir Cecil Hurst's 1923 paper was concerned primarily and almost exclusively with 'Sedentary Fisheries Outside the Three-Mile Limit'.

THE CHANNEL TUNNEL

Perhaps the most best known project for an under-water tunnel is that for a tunnel under the English Channel, a matter which has been discussed periodically for the last 100 years.²⁷ England, France and the Channel all lie on the same continental shelf, and

²⁶ Dept. of State letter to Mr. F. R. Newton, September 10, 1918, 2 Hackworth, *Digest of International Law*, 1941, pp. 679-680.

²⁷ For a historical background, see Colombos, *Le Tunnel sous la Manche*, 1915, Chap. 1, p. 7 *et seq.*

any tunnel constructed under the Channel joining the two countries would run for most of its distance under the high seas, but there is no reason why the tunnel or its accoutrements need interfere in any way with the free navigation of those seas. The mouths of the tunnel would be on English and French soil and any disturbance of the waters would be confined to the territorial belt, for it should not be beyond the realm of practical science to ventilate without sinking ventilation shafts from the high seas.

In an article devoted to *Le Tunnel Sous La Manche et le Droit des Gens*,²⁸ M. Raymond Robin contended that any activity affecting the subsoil of the sea which does not interfere with the liberty of others on the surface is permitted, and that the consent of other States is unnecessary, particularly when the source of the activity is on land or within territorial waters. That this seems in fact to be correct would appear from the freedom with which States do not hesitate to extend coal workings from the shore, under water and beyond territorial limits.²⁹

In 1858, as a result of an arbitration by Patteson, J., between the Crown and the Duchy of Cornwall, Parliament passed the Cornwall Submarine Mines Act.³⁰ This declared that minerals under the open sea and not forming part of the County of Cornwall, vested in Her Majesty in right of her Crown 'as part of the soil and territorial possessions of the Crown'. These workings do not interfere with the enjoyment of the sea, and so far as can be ascertained no foreign State has ever contested the Crown's title to the minerals obtained therefrom.

If one applies to such minerals M. Robin's test of sovereignty it will become clear that the Channel tunnel can belong to England and France just as easily as the Cornwall submarine mines can belong to the Crown: 'For a State to acquire sovereignty over a particular territory, there must be a direct and immediate, continuous and real relationship between the object and the subject of the right of sovereignty, and such a relationship can only be created where there is an effective taking of possession'.³¹ It would be difficult to conceive of any power

²⁸ (1908) 15 *Revue Général de Droit International Public*, p. 50.

²⁹ See U.N. *Memorandum on the Regime of the High Seas*, 1950, Doc. A/CN.4/32, p. 51.

³⁰ 21 & 22 Vict., c. 109, s. 2. See the comments on this arbitration in *The Queen v. Keyn* (1876) 2 Ex.D. 63, *per* Lord Coleridge, C.J., at pp. 155-157, and *per* Cockburn, C.J., at pp. 199-201.

³¹ *Op. cit.*, n. 28 above, p. 69.

other than the United Kingdom and France taking possession of the subsoil of the Channel, and it would be just as difficult to regard a Channel tunnel, the entrances to which are on English and French soil and access to which could be prevented or permitted only by English or French officials, as being anything other than in the effective possession of the two countries, so that juridically the tunnel would, on the basis of accession, belong to the two States concerned. M. Robin pointed out that by 1908 sovereignty over unowned territory could only be acquired by occupation, but that this occupation would be effectively exercised by a society authorised by a State to construct the tunnel. In this connection it should be pointed out that the International Law Commission at its Second Session in July, 1950, rejected the idea that the sea-bed and subsoil of the continental shelf were either *res nullius* or *res communis* and were therefore not amenable to acquisition by occupation.³² On the other hand, it did assert that a littoral State was entitled *ipso jure* to exploit and control the resources of the bed of the marginal sea without relation to the existence of a continental shelf.³³ Since it laid no limit to the extent of such waters, it becomes obvious that here the Commission must have recognised the doctrine of occupation, for without it there would be little left of the principle of the freedom of the seas, and there would be nothing to prevent a particular State asserting jurisdiction, allegedly *ipso jure*, over the sea-bed of unlimited depth and at a vast distance from its coasts—after all Chile has already done this over a stretch of water extending 200 miles from its coast and islands regardless of depth, a claim that members of the Commission, most illogically in the light of its reasoning, condemned vehemently.³⁴ It should be borne in mind, however, that it is difficult to assess the value of the Commission's discussions on this matter, for at an earlier meeting it had accepted the principle 'that neither navigation nor fishing on the high seas can be forbidden to anyone'.³⁵ Further, where most of the members are concerned there seems to be a fundamental unwillingness—

³² *Report of the International Law Commission covering its Second Session, 1950*, U.N. Doc. A/CN.4/34, pp. 61–62.

³³ 1950, U.N. Docs. A/CN.4/SR.67, pp. 16–17, 18–24; 1950, A/CN.4/SR. 68, pp. 9, 13; 1950, A/CN.4/34, pp. 61–62.

³⁴ 1950, U.N. Docs. A/CN.4/SR.67, p. 14; 1950, A/CN.4/SR. 69, pp. 21–22.

³⁵ 1950, U.N. Doc. A/CN.4/SR.63, p. 29.

if not inability—to distinguish principles *de lege lata* from those *de lege ferenda*.³⁶

A pipe-line, similar to the war-time 'PLUTO', would, of course, be in a similar position to a submarine tunnel³⁷ or telegraphic cable, although it is the bed and not the subsoil that is affected. Cables are, in fact, laid in various parts of the high seas without objection or criticism. They give no right to sovereignty and by the Convention of 1884³⁸ are merely protected from interference. The International Law Commission recognised the similarity, and 'agreed on the principle that all States were entitled to lay submarine telegraph and telephone cables on the high seas, and considered that the same principle should also apply to pipe-lines'.³⁹

SEDENTARY FISHERIES

It would appear from what has just been said that title to submarine tunnels and perhaps pipe-lines is acquired by way of occupation, a term which envisages subjection to control, jurisdiction and administration. Tunnels and pipe-lines require the exercise of engineering ingenuity, but there are other resources to be found on the sea-bed that can be exploited without any such intervention. Fisheries are of two kinds, those which are freely mobile and constitute what is generally understood by the word fish, and those that are sedentary. Oysters, pearls, sponges, chanks and the like are to be found in beds or banks in well-defined geographical areas, sometimes within, but just as frequently outside territorial waters. Probably the most famous of these sedentary fisheries are the oyster beds at Whitstable and off the coast of Ireland, the pearl fisheries off Ceylon and Australia, and the sponge beds in the Gulf of Mexico and off Tunis.

The right to exploit such sedentary fisheries has been recognised for centuries. Writing in 1758, Vattel in his *Droit des Gens* asked, 'who can doubt that the pearl fisheries of Bahrein

³⁶ See, for example, 1950, U.N. Doc. A/CN.4/SR.69, pp. 12-13.

³⁷ Cf. Oppenheim, *Der Tunnel unter dem Aermelkanal und das Völkerrecht* (1908) 2 *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1, at p. 4.

³⁸ Convention for the Protection of Submarine Cables, 11 Martens, *Nouveau Recueil Général*, p. 281.

³⁹ Report, 1950, U.N. Doc. A/CN.4/34, p. 60.

and Ceylon may be lawful objects of ownership?'⁴⁰ That the right to exploit the Ceylon pearl fisheries is much older than this is clear from the decision of the Madras courts in *Annakumaru Pillai v. Muthupayal*.⁴¹ The case referred to the taking of chanks from beds in Palk's Bay, which is landlocked for nine-tenths of its circumference by British territories, and which contains numerous islands that form part of India and Ceylon. Ayyar, Offg. C.J., pointed out that 'chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sovereign . . .; and the fishery operations connected therewith have always been carried on under State control. . . . [These fisheries] have been handed down from sovereign to sovereign until, about the end of the eighteenth or the beginning of the nineteenth century, they became vested in the British'.⁴² The learned Officiating Chief Justice then examined the history of these fisheries and drew attention to the fact that there were references to pearl fishing in the area as early as 1330 while in 1700 the Dutch were granting licenses to fish. Since the regulations of 1811 and 1842 Ceylon has issued such licences and rendered ships fishing without licence liable to forfeiture. 'Considering that the various European maritime powers, who from about the sixteenth century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable'.⁴³ That this judgment is in accord with British State practice regarding these fisheries is clear from a series of Parliamentary answers in the House of Commons during April and May, 1923. In these the claim to sovereignty is based on 'immemorial user'⁴⁴ and 'uninterrupted and undisputed proprietorship'⁴⁵ by successive rulers, and it was pointed out that 'some of these banks are more than three miles from the shore, but where they are situated under the high seas the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights

⁴⁰ Book 1, Chap. 23, s. 287, Carnegie translation, 1916, p. 107.

⁴¹ (1904) 27 Indian L.R. (Madras) 551.

⁴² At pp. 554 and 564.

⁴³ At p. 566.

⁴⁴ April 30, 1923, *Hansard*, 5th Series, Vol. 163, col. 993.

⁴⁵ May 2, 1923, *Hansard*, 5th Series, Vol. 163, cols. 1417-1418.

of navigation or of ordinary fishing in the waters over the banks'.⁴⁶

In his article of 1923 on sedentary fisheries, Sir Cecil Hurst recognised that sovereignty over these banks could be acquired by occupation without affecting the status of the high seas.⁴⁷ As he pointed out in his 'Report on the Juridical Status of the High Seas', addressed to the *Institut de Droit International*, the high seas are *res communis* while the sea-bed is in the nature of *res nullius* and, unlike the high seas above it, amenable, with its resources, to occupation.⁴⁸ Nevertheless, in his 1948 address on 'The Continental Shelf' he opined that 'the system of maintaining the existing limits of the sovereignty of the State on the surface of the sea, so as to preserve its character as high seas, when outside the limits of territorial waters, but of recognising a claim to special rights of jurisdiction and exclusive control over a vast area of sea-bed and subsoil would be found, I fear, to be too intricate to give satisfaction'.⁴⁹ Similar doubts were expressed by various members of the International Law Commission during the discussions on the continental shelf at the Commission's Second Session.⁵⁰ Such doubts are the result of too strict an application of the doctrine of sovereignty, which regards ownership as extending not only to the land but to all above it as well, and in this case it would mean the high seas and even the air above them.

Similar problems with regard to sedentary fisheries are involved in the application of the Sea Fisheries Act, 1868,⁵¹ by which power was granted to issue Orders in Council enabling the Irish Commissioners to regulate dredging for oysters on any beds within twenty miles seawards from a straight line joining named points. Some of these banks are between ten and twenty miles beyond the three-mile limit, covering an area of some 1,300 square miles. This legislation has not been controverted by foreign States.

Similar legislation concerning Queensland and Western Australia has not been so fortunate. By the Queensland Pearl

⁴⁶ May 30, 1923, *Hansard*, 5th Series, Vol. 164, cols. 1261-1262.

⁴⁷ *Op. cit.*, p. 61.

⁴⁸ *Annuaire de l'Institut de Droit International*, 1925, pp. 159-160.

⁴⁹ *Op. cit.*, n. 2 above, p. 166.

⁵⁰ See, for example, 1950, U.N. Docs. A/CN.4/SR.67, pp. 12, 29; 1950, A/CN.4/SR.68, pp. 7-8.

⁵¹ 31 & 32 Vict., c. 45, s. 67.

Shell Fisheries Acts, 1881-1931, 'It shall not be lawful to use or employ any ship or boat in the pearl-shell and bêche-de-mer fishery within the Colony of Queensland or within one league to seaward from any part thereof, unless such ship or boat is duly licensed . . .'.⁵² By the Queensland Pearl Shell and Bêche-de-mer Fisheries (Extra-Territorial) Act, 1888, it is similarly provided that 'It shall not be lawful to use or employ any ship or boat within Australian waters adjacent to Queensland in the pearl-shell and bêche-de-mer fishery unless such ship or boat is duly licensed',⁵³ and unlicensed vessels may be seized. By the schedule to this statute 'Australian waters adjacent to Queensland' are delimited to embrace a vast area of the high seas bounded by the Great Barrier Reefs, but by section 19 this Act applies only to British ships and boats attached to British ships. The limiting character of this section is, however, rendered nugatory by section 2 of the Queensland Pearl Shell Fisheries Act, 1898, which provides that no future licences shall be granted other than to British subjects, born or naturalised, denizens of Queensland, and bodies corporate established under and subject to British law.

Western Australia possesses legislation of like character in the Western Australia Pearl Shell and Bêche-de-mer Fisheries (Extra-Territorial) Act, 1889,⁵⁴ and the Pearling Acts, 1912-1949.⁵⁵ In these, reference is made to 'tropical waters adjacent to Western Australia' which are also defined to embrace a vast area of the Pacific Ocean. This Australian legislation was not willingly accepted by non-Australian pearl fishers, and in August, 1923, the American Consul-General in London wrote to the State Department: 'Not only is a very extensive maritime jurisdiction claimed along the coast of Ceylon and Madras, but this is also the case in other parts of the world where pearl fishing is undertaken. . . . Along the coast of Western Australia jurisdiction is claimed and exercised at great distances from the coast,

⁵² 3 *The Public Acts of Queensland*, reprint, p. 543 *et seq.*; 1881, s. 3.

⁵³ *Ibid.*, p. 616; 51 Vict. No. 1, s. 4.

⁵⁴ *Hobart Gazette*, January 18, 1890; the text is reprinted in a collection of 'Federal Council of Australasia Acts, 1886-1897' kept in the Library of the Commonwealth Relations Office, London. By s. 51 (x) of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict., c. 12), the Commonwealth Parliament is given power to legislate with respect to fisheries outside Australian territorial waters.

⁵⁵ Consolidated in *Statutes of Western Australia*, 1924, and No. 36 of 1949.

apparently as much as fifty miles'. In fact, under the statutes this is a very conservative estimate of the distance. 'It appears to be the fact, moreover, in relation to Western Australia that non-Australian pearl fishers objected to this extensive jurisdiction whereupon a long controversy ensued and in the result the Colonial Office in London upheld the position of the government in Western Australia. . . . I believe it to be the case that, throughout the world, wherever there are valuable pearl fisheries, the government concerned claims jurisdiction over the marine areas where such fisheries can be carried on not only to the distance out to sea where actual operations are undertaken but to wide reaches of the open sea beyond, the object being to deal effectively with poachers and to prevent them from gaining access to the pearl beds themselves'.⁵⁶ This statement is almost identical with a statement by Sir Cecil Hurst which has become one of the most famous quotations by a writer on this subject: 'Wherever it can be shown that particular oyster beds, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil. Ownership of the soil by the Sovereign of the country under such circumstances must carry with it the right to legislate for the soil so owned and for the protection of the wealth to be derived from it, and no doubt need be felt as to the binding force of the various enactments which have been issued for the protection of these sedentary fisheries outside the three-mile limit'.⁵⁷

So far we have only had regard to sedentary fisheries claimed by British territories. 'The same principle must of necessity apply also to sedentary fisheries on banks claimed by foreign governments. The Bey of Tunis has, for instance, claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestioned enjoyment of the *fructus* of these banks. Such enjoyment would constitute a title to the bank which foreign States would no doubt

⁵⁶ 2 Hackworth, *Digest of International Law*, 1941, pp. 677-678.

⁵⁷ Hurst, *op. cit.*, p. 58.

recognise and would oblige their nationals to recognise'.⁵⁸ It is interesting to compare this universal approach of Sir Cecil Hurst with the ultra-nationalist outlook shown in the extract from the brief prepared on behalf of Texas that has already been quoted.⁵⁹

The Tunisian coast is not the most important area for sponge banks. According to Professor Hudson at the Sixty-sixth Meeting of the International Law Commission: 'Along the coast of Florida and in the Gulf of Mexico there were very extensive sponge beds. So far as the United States of America was concerned the inhabitants of a certain locality had the exclusive right to work those beds. But the State of Florida only attempted to regulate exploitation in so far as its own citizens were concerned. Mexicans were allowed to work the sponge beds without hindrance and nobody thought of regulating their operations'.⁶⁰ This Florida legislation was the subject of litigation before the Supreme Court of the United States in *Skiriotes v. State of Florida*.⁶¹ By the Constitution of Florida the State boundary was fixed at nine nautical miles—here it should be remembered that on January 6, 1950, the United States replied to a Questionnaire by the International Law Commission that 'the United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles, from the shore'.⁶² A statute of 1927⁶³ forbade the use of diving equipment in taking sponges from the Gulf of Mexico, the Straits of Florida or other waters within the territorial limits of that State. This statute was only in keeping with a 1914 Act of Congress, which prohibited any citizen of the United States or person owing obedience to its laws from taking small sponges 'in the waters of the Gulf of Mexico or the Straits of Florida outside of State territorial limits',⁶⁴ for 'Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise

⁵⁸ *Ibid.*, p. 59. This statement regarding Tunis accords with an opinion of 1871 by Sir Travers Twiss who rested the British and the Tunisian claims on prescription, 2 Smith, *Great Britain and the Law of Nations*, 1935, pp. 121-122.

⁵⁹ *Loc. cit.*, n. 7 above.

⁶⁰ 1950, U.N. Doc. A/CN.4/SR.66, p. 12.

⁶¹ (1941) 313 U.S. 69.

⁶² *Op. cit.*, n. 5 above, p. 104.

⁶³ *Compiled General Laws of Florida*, 1927, s. 8087.

⁶⁴ 38 *Stat. at L.*, 692, Chap. 253.

valid is not impaired'.⁶⁵ The Supreme Court pointed out that Skiriotes was a citizen of Florida who had dived for sponges about six miles off the Florida coast in the Gulf of Mexico, and a State—'and save for the powers committed by the Constitution to the Union the State of Florida has retained the status of a sovereign'⁶⁶—has the right to legislate outside its territory for its own citizens. The court left open the position of foreigners under the statute, for 'no question of international law, or of the extent of the authority of the United States in its international relations, is presented. . . . International law is a part of our law and as such is the law of all States of the Union, but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties'.⁶⁷ This case should be compared with an earlier decision of the Supreme Court. *Manchester v. Commonwealth of Massachusetts*⁶⁸ concerned the application of similar Massachusetts restrictive legislation⁶⁹ to a citizen of Rhode Island fishing within three miles of the shore. We have just seen that in 1942 the Supreme Court repeated its oft-declared belief that the States still possessed sovereign rights, yet in the *Manchester Case* the court said, 'if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes would unquestionably be acknowledged by all foreign nations, and her right to control the fisheries within those boundaries would be conceded'.⁷⁰ If that is so, the Florida legislation could have been sustained even if Skiriotes had been a foreigner.

During the discussions of the International Law Commission various criticisms were made of the assertion that title to sedentary fisheries depends on occupation, and the alternative suggestion of prescription was put forward. It is difficult to see the distinction in international law between occupation and immemorial usage and control, but the distinction is one without a difference in view of the fact that, in its Reply to the Questionnaire issued by the Preparatory Committee of the Codification Conference, the

⁶⁵ (1941) 313 U.S. at p. 75.

⁶⁶ At p. 77.

⁶⁷ At pp. 72-73.

⁶⁸ (1890) 239 U.S. 240.

⁶⁹ Act for the Protection of the Fisheries in Buzzard's Bay, 1886 (*Laws of 1886*, Chap. 192).

⁷⁰ At p. 257.

British Government linked the two together, saying: 'through long usage these (sedentary) banks are regarded as being occupied and constituting property'.⁷¹

RECENT STATE PRACTICE

In discussions on the continental shelf the point of departure with regard to State practice is normally the Truman Proclamations of 1945. There were, in fact, earlier State acts which served a similar purpose, but these made no reference to the continental shelf in express terms. We have already seen that as early as 1925 a Ceylon Ordinance defined the 'pearl banks' as a 'determinate area between the three- or in places five-fathom line and the hundred-fathom line',⁷² that is to say the continental shelf. Some twenty years later, in 1942, the United Kingdom and Venezuela signed a treaty relating to the submarine areas of the Gulf of Paria.⁷³ This gulf is a narrow stretch of water lying between Trinidad and Venezuela and is not normally used by international shipping. By the treaty the two Powers agreed not to assert any claim to sovereignty or control over the submarine areas, defined as the sea-bed and subsoil outside territorial waters, lying to either side of specified demarcation lines, and each undertook to recognise any claim put forward by the other on its own side. By Article 6 the parties declared that the treaty in no way affected the status of the waters or rights of passage or navigation over them. Later in the year an Order in Council⁷⁴ was issued pointing out that Venezuela had annexed those parts of the submarine areas which lay on her side of the lines, and annexing the remainder to 'form part of His Majesty's dominions . . . attached to the Colony of Trinidad and Tobago for administrative purposes'. In so far as third Powers are concerned, this treaty and the consequent annexations are of no effect without recognition, for *pacta tertiis nec nocent nec prosunt*. Since, however, the Gulf is not on normal navigational routes and is a narrow strait, it may well be that any third State, particularly one geographically far away, seeking to exploit its submarine areas, or even to protest at interference with the freedom of the

⁷¹ *Bases of Discussion*, No. 2, p. 28.

⁷² Pearl Fisheries Ordinance, No. 2 of 1925, *loc. cit.*, n. 20 above.

⁷³ Treaty Series No. 10 (1942); Cmd. 6400 (1942).

⁷⁴ The Submarine Areas of the Gulf of Paria (Annexation) Order, 1942, 1 S.R. & O., 1942, p. 919.

seas of the Gulf, might be met with a plea alleging abuse of rights. So far as can be ascertained, no protest has been lodged at the annexation.

Matters took a new turn in September, 1945. In that month President Truman issued two Proclamations and two Executive Orders with regard to fisheries and the natural resources of the sea-bed off the coasts of the United States. We are only concerned with the Proclamation concerning the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf.⁷⁵ The Executive Order connected thereto merely placed these resources under the control and jurisdiction of the Secretary of the Interior.⁷⁶ The Preamble to the Proclamation pointed out that there was a world-wide need for new sources of petroleum and other minerals, and indicated that experts believed such resources to underlie the continental shelf of the United States. It indicated that 'recognised jurisdiction over these resources is required in the interest of their conservation and prudent utilisation when and as development is undertaken'. It is implicit in this statement that the President was aware that his Proclamation would be breaking new ground, and that recognition by third States would be necessary when exploitation was attempted. Nevertheless, the Preamble went on to assert that it was only just that the contiguous nation should exercise jurisdiction over the resources of the subsoil and sea-bed of the continental shelf, for, apart from the ease of exploitation connected therewith, 'the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it', and that 'self-protection compels the nation to keep a close watch over activities off its shores', although no indication was given of the distance off-shore a watch must be kept to ensure self-protection. In the light of modern developments in the field of guided projectiles there may well be no limit to this distance. In view of the reasons set forth in the Preamble, the President, while reserving the status of the waters as high seas with unrestricted rights of navigation thereon, proclaimed that 'the Government of the United States regards the natural resources and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States,

⁷⁵ (1946) *American Journal of International Law*, Supplement, p. 45.

⁷⁶ *Ibid.*, p. 47.

subject to its jurisdiction and control'. The Proclamation recognised that the United States claim might overlap that put forward by another State, and provided that such matters should be settled bilaterally in accordance with 'equitable principles'. That such a provision is not unnecessary is clear from the fact that, although the Proclamation makes no reference to the extent of the continental shelf, a Press Release issued by the State Department on the same day stated that the Proclamation would 'make possible the orderly development of an underwater area 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms of water is considered as the continental shelf'.⁷⁷

Before considering any other State documents it is necessary to examine the nature of the Proclamation. The term 'sovereignty' does not appear anywhere in the Proclamation, the Executive Order or the Press Release. It is difficult, however, to see the difference between asserting that something 'appertains to the United States, subject to its jurisdiction and control', and saying simply that the subject-matter is 'subject to the sovereignty of the United States'. In the *Island of Palmas Case*, to which the United States was a party, and the award in which it accepted, Judge Huber stated that 'sovereignty . . . in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. . . . Territorial sovereignty involves the exclusive right to display the activities of a State'.⁷⁸ For these reasons, one is inclined to agree with Professor Brierly that 'if the littoral State had exclusive rights of control and jurisdiction over the subsoil, it could be regarded as enjoying sovereignty'.⁷⁹ Sir Cecil Hurst goes even further: 'If the rights claimed over the continental shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation'.⁸⁰ The United States has, however, on numerous occasions, reiterated that it is not asserting sovereignty, and it has, in fact, protested⁸¹

⁷⁷ (1945) 13 *Department of State Bulletin*, p. 484.

⁷⁸ (1928) Permanent Court of Arbitration; (1949) 2 *Reports of International Arbitral Awards*, 829, at pp. 838, 839.

⁷⁹ (1950) U.N. Doc. A/CN.4/SR.68, p. 8.

⁸⁰ *Op. cit.*, n. 2 above, p. 160.

⁸¹ *Op. cit.*, n. 5 above, pp. 113-116.

at the similar Proclamations issued by Argentina,⁸² Chile⁸³ and Peru,⁸⁴ for these have asserted national sovereignty over the continental shelf and over the seas adjacent to their coasts. The Secretariat of the United Nations has also made much of this distinction between the United States and the Latin-American Proclamations, and of the absence of any claim to sovereignty on the part of the former.⁸⁵ It should be remembered, however, that the mere use or non-use of a word proves nothing. During the China 'incident' Japan maintained that it was not at war, but in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co.*⁸⁶ it was held that for the purposes of the charter-party in issue 'war' could exist in fact, even though it did not exist in law. The World Court has also pointed out that substance is of greater significance than form.⁸⁷

It is perhaps not surprising that the United States Proclamation was followed by a number in similar form issued by other States, particularly those of Latin and Central America. Declarations affecting the continental shelf and its resources have been issued by Mexico, Argentina, Chile, Peru, Costa Rica, Cuba and Nicaragua.⁸⁸ Most of these decrees have differed from the United States Proclamation on which they purport to be based in that they expressly proclaim sovereignty over the continental shelf—although, as we have seen, this is rather in the nature of a distinction without a difference—and also over the waters of the epicontinental sea. Chile, Peru and Costa Rica proclaim their sovereignty over a belt of sea extending 200 miles from their national coasts, claims which have been contested by the United States.⁸⁹ Nicaragua has gone so far as to define its national territory in its Constitution as lying 'between the Atlantic and

⁸² (1947) 41 *American Journal of International Law*, Supplement, pp. 11-12. This Decree refers to an earlier assertion of sovereignty over the 'Argentine Continental Shelf' issued in 1944.

⁸³ (1948) 2 *International Law Quarterly*, p. 135.

⁸⁴ *Ibid.*, p. 137.

⁸⁵ *Memorandum on the Regime of the High Seas*, 1950, U.N. Doc. A/CN.4/32, pp. 47-48, 81.

⁸⁶ [1939] 2 K.B. 544.

⁸⁷ *Mavrommatis Palestine Concessions* (1924) Series A, No. 2, p. 34; *Chorzów Factory* (Judgment) (1927), Series A, No. 13, p. 16.

⁸⁸ These Decrees are summarised in Young, Recent Developments with respect to the Continental Shelf (1948) 42 *American Journal of International Law*, p. 849; and in an unsigned article in *Armada*, the journal of the Colombian Navy, May/June 1950, p. 24, entitled 'Definición del Mar Territorial y del Ilmado Zócalo Epi-continental'.

⁸⁹ *Loc. cit.*, n. 81 above.

Pacific Oceans and the Republics of Honduras and Costa Rica, and includes also the adjacent islands, the territorial sea, the continental shelves and the aerial and atmospheric space'.⁹⁰ Perhaps the most apposite comment made on these legislative measures is that of the anonymous author of the *Armada* article: 'From the strictly juridical point of view, the value of these depositions contained in the laws of a single State, above all a weak State which does not have the elements to make them respected internationally, is highly disputable'.⁹¹ The implication is that matters might be different if a strong State, perhaps the United States, were involved. In this connection it is interesting to note the comment of Professor Jessup on the Copeland Bill, 1938, which sought to extend United States jurisdiction to 'all the waters and submerged land adjacent to the coast of Alaska . . . and lying within the limits of the continental shelf. . . .': 'The legal theory of the projected coast submerged beneath the waters of the sea, which seems to underlie the Copeland Bill, could scarcely be defended by the United States in an international controversy'.⁹² This comment is in keeping with the refusal by the United States to recognise a Portuguese claim to control over the offshore fisheries in the high seas on the basis of a shallow sunken plain,⁹³ an attitude that seems to be reversed in the 1945 Proclamation.

It should not be thought that only the American States have indulged in unilateral declarations annexing the resources of the continental shelf. After 1948 the United Kingdom issued a series of Orders in Council altering the boundaries of its Caribbean colonies.⁹⁴ These extended 'the boundaries of the Colony . . . so as to include the continental shelf contiguous to the coasts of the Colony'. In a parliamentary answer it was made clear that the object was 'to extend the jurisdiction of the governments of these Colonies so as to give them control over the sea-bed and subsoil contiguous to their coasts, with a view to

⁹⁰ Constitution, January 21, 1948, Art. 2; 2 Peaslee, *Constitutions of Nations*, 1950, p. 636.

⁹¹ *Loc. cit.*, n. 88 above.

⁹² 'The Pacific Coast Fisheries', (1939) 33 *American Journal of International Law*, p. 129, at p. 135.

⁹³ League of Nations Doc. C.44.M.21.1926.V,35,44, cited Anon., 'Power of a State to Extend its Boundary Beyond the Three-Mile Limit', (1939) 39 *Columbia Law Review*, 317, at p. 323, n. 59.

⁹⁴ The Bahamas (Alteration of Boundaries) O. in C., 1948, No. 2574; Jamaica, 1948, No. 2575; British Honduras, 1950, No. 1649.

securing such natural resources as may exist there'.⁹⁵ In 1950 a similar Order was issued with regard to the Falkland Islands.⁹⁶ This uses the words 'continental shelf' in its title, refers to the 100-fathom line and defines the new boundary based thereon. In 1950 Pakistan, too, issued a Declaration 'that the sea-bed along the coasts of Pakistan extending to the one hundred fathom contour into the open sea shall . . . be included in the territories of Pakistan'.⁹⁷ Similar proclamations have been made by Saudi Arabia, Bahrain, Qatar, Kuwait and the Sheikdoms along the Trucial Coast of the Persian Gulf.⁹⁷ All these States border the Persian Gulf, which does not lie on a continental shelf, but is merely a basin less than 100 fathoms in depth on the Asian continental land-mass. These proclamations relate to the resources of the subsoil and sea-bed generally, but are primarily directed to the exploitation of oil, and each recognises that the boundary limits should be determined on equitable principles by agreement with neighbouring governments.

The fundamental problem raised by all these State acts relates to the freedom of the seas. Before considering this, however, it is necessary to pause a moment to examine the allegedly legal grounds on which most of them have been based. In the first place, contiguity. We have already seen that the United States objected to Portuguese claims based on similar grounds. We have also noted that the United States accepted the award in the *Palmas* arbitration. In that case Judge Huber declared that 'title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law. . . . Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty, for it is wholly lacking in precision and would in its application lead to arbitrary results'.⁹⁸ The doctrine of contiguity has about as much validity as the similar concepts of 'spheres of influence' and 'hinterland', described by the United States in a Note to Sir Julian Pauncefote

⁹⁵ December 17, 1948, *Hansard*, 5th Series, Vol. 459, written answers, cols. 229-230.

⁹⁶ The Falkland Islands (Continental Shelf) O. in C., 1950, No. 2100.

⁹⁷ *The Gazette of Pakistan*, Extraordinary, March 14, 1950.

⁹⁸ Saudi Arabia, (1949) 43 *American Journal of International Law*, Supplement, p. 156; Bahrain, *ibid.*, p. 185. All these Proclamations are discussed by Young, 'Saudi Arabian Offshore Legislation', (1949) 43 *American Journal of International Law*, p. 530; 'Further Claims to Areas Beneath the High Seas', *ibid.*, p. 790.

⁹⁹ *Op. cit.*, n. 77 above, pp. 855, 869.

as 'new departures which certain European powers have found necessary and convenient in the course of their division among themselves of great tracts of the continent of Africa, and which find their sanction solely in their reciprocal stipulations'.⁹⁹

Some of the Latin-American countries have claimed that their decrees are based on a rule of customary law stemming from the United States Proclamation, 1945, but the United States has itself rejected this 'honour' in its reservations,¹ and it is difficult to talk of a custom when the alleged basis of it does not exist, and is itself a departure from former policies and practices. This type of reasoning reminds one of those who talk of a legal duty to recognise new governments merely because for a period during the last twenty years or so this or that country of major importance extended immediate recognition to *de facto* governments. The most that can be said is that a practice has grown up among certain Latin-American countries—perhaps also among the littoral States of the Persian Gulf—whereby one of them might be estopped from denying the legality of the activities of the others. As Judge Alvarez pointed out in his dissenting opinion in the *Asylum Case*, the term "American international law" . . . does not mean . . . an international law which is peculiar to the New World and entirely distinct from universal international law, but rather the complex of principles, conventions, customs, practices, institutions and doctrines which are peculiar to the Republics of the New World. . . . If American precepts are not recognised by the countries of other continents, they must be applied only in the New World',² and, in accordance with the maxim *res inter alios acta*, only among those countries of the New World which recognise them, for, as the majority pointed out, 'the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. [It] must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question'.³

Of the rules of customary international law there is probably none more universally recognised than that of the freedom of the

⁹⁹ (1898) 1 Moore, *International Arbitrations*, p. 975, at p. 979.

¹ Loc. cit., n. 81 above.

² *Op. cit.*, n. 24 above, p. 290, at p. 293. See also the dissenting opinions of Judges Read and Azevedo, at pp. 316, 332.

³ *Ibid.*, p. 276.

seas. This freedom applies to the whole of the high seas and not merely to the usual navigation routes, although there may be areas where for special reasons this is not so, as has been suggested already in this paper in connection with the Gulf of Paria. As we have seen, the exploitation of sedentary fisheries causes no interference with the rights of others on the high seas. Where prospecting for oil and other minerals is concerned, however, it is in the essence of things that some artificial structure, like a derrick, must be erected projecting through the surface of the water. *Prima facie* it would seem that any such derrick, together with its necessary appurtenances, would constitute an interference with the freedom of the seas. We are confronted here with a conflict between the right to occupy the sea-bed and exploit its resources, and the right to the freedom of the seas. Since international law is a virile force and must adapt itself to developing circumstances, a problem of adjustment is involved requiring a determination, 'in each individual case, whether the freedom of the seas and the idea of a permanent exclusive occupation of the bed of the sea for the given purpose are mutually exclusive or complementary'.⁴ The State which is claiming the freedom of the seas is asserting an established right. The *onus probandi* must, therefore, be upon the State that is seeking to exploit the mineral resources. In the Report to the Brussels Conference of the International Law Association on 'Rights to the Sea-Bed and its Subsoil' we read that 'in the near future it may be expected that the right of the oil prospector to drill in the open sea will be recognised in international law to the same extent as the right of navigation and fisheries to use the sea for their purposes. And it will then be acknowledged by law that the oil prospector is not to be regarded as a trespasser *vis-à-vis* shipping and fishing industries merely because he is sinking his well in the sea, but that the onus of proof will be upon those who consider that the freedom of the seas is thereby infringed'.⁵ In this connection it is perhaps relevant to point out that the report was drawn up by Jonkheer Feith, the legal adviser to Royal Dutch Shell,⁶ who was appointed *rapporteur* of the special committee established by the International Law Association to study this problem.

⁴ *Op. cit.*, n. 85 above, p. 74.

⁵ (1950) *Report of the 43rd Conference, Brussels, 1948*, p. 183, at pp. 192-193.

⁶ 1950, U.N. Doc. A/CN.4/SR.66, p. 22.

It has been suggested throughout this paper that title to the continental shelf and its resources depends upon effective occupation, in the same way as does title to land⁷ or guano islands,⁸ although it is true that the requirements for effective occupation depend on the nature of the terrain, the difficulty of settlement and the like. What is necessary for land, therefore, may be more than the minimum required for the sea-bed. Nevertheless, mere proclamations and unilateral declarations can amount to no more than inchoate titles requiring some measure of occupation or exploitation to perfect them. It is insufficient to base claims on an alleged legal doctrine of the continental shelf, which, as we have seen, the International Law Commission regards as unnecessary, recognising claims to exploit marine resources regardless of the existence of the shelf, while some States, like Chile, pay but lip service to the concept in order to claim vast areas of territory for themselves. There is no need for dialectical acrobatics. As Professor Waldock has said, 'we should not be in a hurry to accept a totally new concept as a substitute for the existing customary law of occupation. There is probably less risk of the existing law failing to meet the legitimate requirements of States in the exploitation of the sea-bed than of a hastily advanced new doctrine undermining the international character of the high seas'.⁹

Without some act of effective occupation these State acts have no more value than the Papal Bull *inter caetera* of 1493, which purported to award the yet undiscovered New World to Ferdinand and Isabella¹⁰; or of the empty flamboyant gestures

⁷ *Palmas Case*, *op. cit.*, n. 78 above, pp. 839, 846, 851-852, 857-859; *Clipperton Island Case* (1931), *ibid.*, p. 1105, at p. 1110; *Legal Status of Eastern Greenland*, *op. cit.*, n. 14 above, pp. 45-46, 48, 62-63.

⁸ (1906) 1 Moore, *Digest of International Law*, p. 561.

⁹ *The Legal Basis of Claims to the Continental Shelf*, address to the Grotius Society, 1950, printed in *International Law Association* pamphlet 'Rights to the Sea-Bed and its Subsoil', 1950, p. 19, at p. 51.

¹⁰ Section 6, '... omnes Insulas et Terras firmas inventas et inveniendas, detectas et detegendas versus Occidentem et Meridiem; fabricando et construendo unam Lineam à Polo Arctico, scilicet septentrione, ad Polum Antarcticum, scilicet Meridiem (sive Terrae firmae et Insulae inventae et inveniendae sint versus Indiam, aut versus aliam quamcunque partem,) quae Linea distet à qualibet Insularum, quae vulgariter nuncupantur de los Azores y Cabo verde, centum leucis versus Occidentem et Meridiem: ita quod omnes Insulae et Terrae firmae repertae et reperendae, detectae et detegendae à praefata Linea versus Occidentem et Meridiem per alium Regem aut Principem Christianum non fuerint actualiter possessae, . . . ; quando fuerint per Nuntios et Capitaneos vestros inventae aliquae praedictarum Insularum . . .'; 3 Du Mont, *Corps Universel Diplomatique*, Part 2, 1726, p. 302, at p. 303.

of the conquistadores who would enter the seas and claim all that lay beyond for their sovereign; or of Autharis, King of the Lombards, of whom Selden writes that 'there was a pillar placed within the very waters of the sea, which wash the city of Rhegium. To that pillar . . . King Autharis came on horseback, and touched it with the point of his spear, saying, even in this place shall be the bounds of Lombardy'.¹¹

¹¹ *De Mare Clausum*, 1635, Book 1, Chap. 13, English translation by Gent, 1663, p. 76.

DIPLOMATIC IMMUNITY IN ENGLISH LAW

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SOME measure of diplomatic immunity is clearly required by international agreement and custom, and, from this point of view, the recognition of diplomatic immunity by English law may, perhaps, be regarded as complying with the international lawyers' frequent appeal for the maintenance of the rule of law in international affairs. This means that States should abide by the accepted rules of international law and accept certain obligations as binding upon them. From the narrower point of view of municipal law, however, the recognition of diplomatic immunity in English law clearly infringes the rule of law, in that it necessitates an exception being made to the doctrine that all men should be equal before the law and subject to the same laws administered in the same courts.¹ It is the purpose of this paper to consider the scope of diplomatic immunity in English law, and then to consider whether the requirements of the rule of law in the international sphere justify the violation of the rule of law in the municipal sphere.

A very cursory glance at the scope of diplomatic immunity in English law reveals that all three organs of government, executive, legislature and judiciary, have had an important part to play in determining that scope, and, accordingly, it has been found convenient in this paper to consider the scope of the immunity in relation to the part played by the legislature, judiciary and executive respectively.

THE LEGISLATURE AND DIPLOMATIC IMMUNITY IN ENGLISH LAW

In considering the work of the legislature in relation to diplomatic immunity, we immediately meet the problem of whether the source of diplomatic immunity in English law is statutory or

¹ For the Rule of Law, see Dicey, *Law of the Constitution* (9th ed., 1950), pp. lxvii-xcv, and pp. 183-414.

common law. The question is whether the Diplomatic Privileges Act, 1708, is the source of diplomatic immunity or whether it is merely declaratory, and by no means exhaustive, of an immunity previously recognised by the common law. To deal with this problem it is necessary to consider the purpose and provisions of the Act, and the interpretation placed upon those provisions by the courts.

It is a familiar fact that the event which led to the passing of the Act was the arrest of Andrew Artemonavitz Mattueoff for debt in 1707.² He was at that time the Russian ambassador to England. The persons who effected the arrest were prosecuted in the Court of Queen's Bench and the facts in issue were found proved. No conviction was, however, recorded, as it was not decided whether the facts made the accused guilty of an offence at law. This occurrence led to strained relations between England and Russia, the Tzar demanding the death penalty for the violation of his ambassador's diplomatic immunity, a penalty which was clearly beyond the scope of English law to inflict. This resulted in the passing of the Diplomatic Privileges Act, 1708.

The vital section of this Act is section 3, which provides that 'all writs and processes that shall, at any time hereafter, be sued forth or prosecuted, whereby the person of any ambassador or other publick minister of any foreign province or state authorised and received as such by Her Majesty her heir or successors, or the domestick servant of any such ambassador or other publick minister, may be arrested or imprisoned or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions and purposes whatsoever'. Of the remaining sections, section 4 provides for the punishment of all persons initiating proceedings against those protected by section 3, all attorneys and solicitors concerned in such actions, and all officers executing any such writ or process. Section 5 provides that traders in the service of any such ambassador or public minister shall not be protected by the Act. Section 6 provides that no person shall be prosecuted for having arrested the servant of an ambassador or public minister, unless the name of the servant is registered in the office of one of the principal Secretaries of State and by such

² For the details of this incident, see Martens, *Causes Célèbres du Droit des Gens* (1827), Vol. 1, pp. 47-74.

Secretary transmitted to the Sheriffs of London and Middlesex or their under-sheriffs or deputies, and displayed by the latter in some public place in their office.

The courts have consistently taken the view that diplomatic immunity existed at common law prior to the passing of the above Act, and that the Act is simply declaratory of the common law and by no means exhaustive of it. It is proposed to consider some of the cases in which this proposition has been laid down, and to consider the validity of the reasons mentioned in those cases. Many of the cases in which this view has been propounded have turned upon the fact that the Act only refers to ambassadors and public ministers and the 'domesticks' and 'domestick servants' of such persons, and this raises difficulties in relation to attachés, secretaries and similar members of the official staff of the embassy. Thus, in *Parkinson v. Potter*,³ one of the questions for decision was whether an attaché was within the privilege. Mathew, J., in delivering judgment, said: '... our attention was called to the provisions of the statute 7 Anne c. 12 s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and, according to that law, it is clear that all persons associated in the performance of the duties of the embassy are privileged, and that an attaché is within that privilege'.⁴

Again in *Hopkins v. De Robeck*,⁵ it was contended that the defendant, who was employed as a secretary to the Swedish ambassador, was not within the privilege because he was not a domestic of the Swedish minister. It was held that the defendant was entitled to the privilege although not a domestic of the ambassador—'The Statute of Anne is only explanatory of the law of nations; and the words "domestic and domestic servant" are only put by way of example'.⁶

With reference to these and similar cases,⁷ it is submitted that it might, perhaps, have been possible to reach the desired conclusion, *viz.*, that attachés, secretaries and others are protected by

³ (1886) 16 Q.B.D. 152.

⁴ *Ibid.*, at p. 157.

⁵ (1789) 3 T.R. 79.

⁶ *Ibid.*, at p. 80.

⁷ *E.g.*, *Darling v. Atkins* (1769) 3 Wils. K.B. 33.

diplomatic immunity, without recourse to the theory that the Act of Anne is not exhaustive. This possibility was suggested by Lord Phillimore and by Viscount Dunedin in *Engelke v. Musmann*.⁸ Lord Phillimore said⁹: 'The ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and children living with him, his "diplomatic family", as it is sometimes called, that is to say, his counsellors, secretaries, and clerks, whom I take to be intended by the word "domestic" in the Statute of Anne, and his ordinary servants, described in the statute as "domestic servants" . . .'. Viscount Dunedin, in referring to Mr. Engelke, who was an official member of the German embassy, and described as a consular secretary attached to the embassy, said¹⁰: 'Mr. Engelke is, in the words of the statute, "a domestic of the ambassador"'. In the *Oxford Dictionary*, "domestic", as a substantive, is defined as "a member of the household; one who dwells in the same house as another; an inmate", and in 1656 there is a quotation, "From that time he had his accesses . . . to His Majesty's presence as a domestique without ceremony"'.

It may, perhaps, be suggested, in support of Lord Phillimore's and Viscount Dunedin's view, that, if the Act was intended to be declaratory of the common law, as has been so frequently and consistently asserted, it would seem strange that it should mention the ambassador and his domestic servants and leave unmentioned the official staff of the embassy. The answer may be, of course, that at the time the Act was passed, an ambassador's staff would be small enough to enable them all to dwell under the same roof and thus be properly described as domestics, but that with the passing of the years the increase in embassy staffs rendered the term 'domestic' insufficient to describe all the official staff. In any case, the view put forward by Lord Phillimore and Viscount Dunedin that embassy staff are 'domestics' within the meaning of the Act of Anne is not supported elsewhere in the Reports. The general consensus of authority is in favour of regarding official staff as enjoying diplomatic immunity by virtue of common law.

⁸ [1928] A.C. 433.

⁹ *Ibid.*, at p. 450.

¹⁰ *Ibid.*, at p. 447.

Furthermore, the difficulty of regarding official members of the embassy staff as 'domestics' has not been the only reason for regarding the Act of Anne as being far from exhaustive. Thus, in *The Amazone*,¹¹ the affirmation of the common law basis of diplomatic immunity was occasioned by another apparent omission from the Act. The defendant, an assistant military attaché to the Belgian Embassy in London, sought to set aside a writ *in rem* issued by the plaintiff, his wife, for possession of a yacht. The main ground for the motion was that the defendant was immune from the process of court by reason of diplomatic status. The plea of diplomatic immunity was resisted on the ground that immunity depended solely on section 3 of the Diplomatic Privileges Act, 1708, under which the defendant, to succeed in his plea, had to show that the ship was his property.

Section 3, it will be recalled, provides that writs and processes whereby the person of any ambassador, domestic or domestic servant may be arrested or imprisoned or *his* or their *goods* may be distrained, seized or attached, shall be null and void. The trial judge, nevertheless, held that the defendant was entitled to diplomatic immunity, and the wife appealed. The Court of Appeal disallowed the appeal, holding that the 1708 Act was not exhaustive and that the defendant was entitled to immunity at common law. Slessor, L.J., said¹²: 'The question in issue has, in substance, already been considered, and, I think, decided in *Parkinson v. Potter*,¹³ in which it was assumed, as had been said in earlier cases, that the Statute of Anne is by no means exhaustive of the common law dealing with diplomatic immunity.' Mackinnon, L.J., agreed, saying¹⁴: 'It is perfectly plain from the authorities that the Act was not meant to define exhaustively the nature of diplomatic privilege, but was merely confirmatory of the common law'. The explanation put forward by the court for the apparent defect in the Act was that at the time the Act was passed all civil proceedings were in fact commenced by arrest by civil process or by distraint. Thus, both in the case of the omission of express mention of official embassy staff and in this latter case, it would appear possible that the Act

¹¹ (1940) 56 T.L.R. 266.

¹² *Ibid.*, at p. 267.

¹³ (1886) 16 Q.B.D. 152.

¹⁴ *Ibid.*, at p. 268.

was exhaustive at the time it was passed and, although it has subsequently been regarded by the courts as incomplete, this may be due to changing circumstances.

Judicial decisions since 1708 clearly indicate, then, that in the view of the judges the Act of 1708 is far from containing a complete exposition of the law concerning diplomatic immunity, and that immunity is, in their view, enjoyed by virtue of the common law as well. Whether, however, it is true to assert as a historical fact that diplomatic immunity existed at common law prior to the Act of Anne seems to be open to doubt. It may well be that immunity did not exist at common law prior to the Act, that the Act was meant to be exhaustive at the time it was passed, and that the courts have stated that immunity was always enjoyed by virtue of the common law simply because changing circumstances have made the Act an incomplete exposition of international law on this subject. We have the authority of Blackstone for saying that an ambassador's immunity from civil suit and arrest was not established in England until the enactment of the statute 7 Anne, c. 12. On the other hand, Lord Mansfield categorically declared, in *Heathfield v. Chilton*,¹⁵ that diplomatic immunity was protected by the common law prior to the Act, and it is his opinion which has prevailed in the courts.

An exhaustive examination of the question was carried out by Professor Adair,¹⁶ who came to the conclusion that Blackstone's view was the correct one, and although his conclusions were criticised by Berriedale Keith,¹⁷ to my mind Adair's original arguments and his answers to Keith's criticisms¹⁸ are quite convincing. An interesting and, perhaps, significant feature of the controversy is that neither Adair nor Keith was able to cite cases decided before the Statute of Anne to support their respective contentions. Adair seems to suggest a reasonable explanation of this lack of authority when he says¹⁹ that there are no cases in which diplomatic immunity was pleaded and failed before 1709 because immunity was protected by an appeal to the prerogative powers of the Crown to stop the proceedings. This

¹⁵ (1767) 4 Burr. 2015.

¹⁶ *The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929).

¹⁷ *Journal of Comparative Legislation and International Law*, Vol. 12, pp. 126-127.

¹⁸ *Ibid.*, Vol. 13, p. 133 *et seq.*

¹⁹ *Ibid.*, at pp. 134-135.

lack of judicial authority prior to 1709 is, of course, at the root of the controversy. As was said in *Taylor v. Best*²⁰: 'But the truth of the matter is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law books are (in general) quite silent upon it previous to the reign of Queen Anne . . .'.²¹

The few pre-1709 decisions on diplomatic immunity provide no clear answer to the question whether immunity was enjoyed at common law or not, but it is noticeable that in all the cases the plea of immunity failed for one reason or another. Thus, in the case of *Don Pantelon Sa*,²¹ the brother of the Portuguese ambassador was arrested for having been concerned in a riot and murder in London. He pleaded that he was the ambassador's brother and that he also had a commission to be the ambassador when his brother should be absent, and that by the law of nations he was privileged. It was held that by the common law, the civil law and the law of nations, the proceedings in the case were justified, but it may well be that the basis of the case is that the brother of the ambassador is not within the privilege.²²

Whether or not diplomatic immunity existed at common law prior to the Act must, then, remain uncertain. However, it is clear that the courts have consistently regarded the Act as declaratory of the common law and by no means exhaustive, whatever the possible weaknesses in their arguments. As a result of this judicial attitude the Act of 1708 seems to be of little or no importance at the present day in considering the scope of diplomatic immunity. As Sir Cecil Hurst has said²³: 'As an embodiment of the law on the subject of diplomatic immunities this statute of 1708 is indeed very inadequate'.

The present writer would suggest that its existence does nothing to help us in considering the scope of diplomatic immunity and a case might be made out for its complete repeal. Thus, sections 1 and 2 of the Act have long since been repealed.²⁴ Section 3, which, it will be recalled, renders null and void certain writs and processes issued against ambassadors or their domestics

²⁰ (1854) 14 C.B. 487, at pp. 491-493.

²¹ (1654) 5 St. Tr. 462.

²² Other pre-1709 cases, all inconclusive, are *Pole's Case* (temp. 1509-1547) 4 Co.Inst. 153; *Marche's Case* (1615) 1 Roll Ref. 175; *Pilkington v. Stanhope* (1694) 2 Vern. 317.

²³ *The Collected Papers of Sir Cecil J. B. Hurst* (1950), p. 192.

²⁴ Statute Law Revision Act, 1867.

or domestic servants, confers or declares a narrower immunity than that conferred by common law, and is, therefore, of no present importance.²⁵ Furthermore, the section has been judicially rendered nugatory to the extent that the proceedings are not null and void, but merely voidable in that the immunity can be waived.²⁶

Section 4 of the Act, which provides for the punishment of all persons, including solicitors and attorneys, concerned in actions against ambassadors, has long been in abeyance, probably desirably so from the lawyer's point of view. In *The Amazone*,²⁷ Slessor, L.J., pointed out²⁸: 'In section four . . . it (the Act of 1708) provides for the punishment of attorneys who seek to enforce process and states that they "shall suffer such pains, penalties, and corporal punishment as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted"'. I do not know that any attorney has ever been corporally punished under this statute for such proceedings. It may be that in a certain view the attorneys in this case are in peril of receiving such punishment, but we have not got to adjudicate on that point'. However, in 1948 the legislature removed the possibility of corporal punishment being inflicted, whilst still leaving intact the provision for the imposition of such other pains and penalties as may be thought fitting.²⁹

It will be recalled that section 6 of the Act provides an exception to the cases where punishment may be inflicted under section 4 and, therefore, since section 4 appears to be in abeyance, section 6 is of no importance. With reference to this section Goddard, L.J., pointed out in the case of *The Amazone*³⁰: 'There is, here, a striking instance of the inaccuracy of a marginal note because the marginal note says "No merchant, etc., to have any benefit of this Act, nor the servant of an ambassador, unless

²⁵ It is possible, however, that the section may be of some help in determining the question of immunity from criminal liability. See p. 97, *post*.

²⁶ See p. 94, *post*.

²⁷ (1940) 56 T.L.R. 266.

²⁸ *Ibid.*, at p. 267.

²⁹ The Criminal Justice Act, 1948, s. 79 and the Schedule, provides: 'In section 4 of the Diplomatic Privileges Act, 1708, for the words "penalties and corporal punishment", there shall be substituted the words "and penalties"'.
³⁰ (1940) 56 T.L.R. 266, at p. 268.

registered". That is not what the section provides. It says that solicitors and others are not to be liable to penalties for proceeding against servants of an ambassador who are not registered, and it has now been held that, though a servant is not registered, he may yet have diplomatic privilege'. It may perhaps be remarked that if the judicial view, that the Act simply declares the law and annexes certain penalties to those who transgress it, is correct, then perhaps the marginal note to section 6 is not so inaccurate as Lord Goddard suggests. In the view of the courts, the only benefit of the Act seems to be the provision for the punishment of violators or diplomatic immunity. As was said in *Engelke v. Musmann*,³¹ 'the Statute of Anne does no more than confirm the common law and annex certain penalties to those who transgress it'.

The remaining section of the Act, section 5, provides that 'no merchant or other trader whatsoever, within the description of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or publick minister, shall have or take any manner of benefit by this Act'. There has been very little judicial interpretation of this section. It has been judicially settled by the cases of *Taylor v. Best*³² and *Magdalena Steam Navigation Co. v. Martin*,³³ that the ambassador himself is still immune from liability notwithstanding trading activities on his part. Equally, it is clear from the section itself that domestics and domestic servants who engage in trading do not enjoy diplomatic immunity. It must, however, to my mind, be regarded as doubtful whether official embassy staff engaging in trading enjoy immunity, since it has been consistently held that official staff are not domestics and so are not within the scope of the Act. If official members of the embassy staff who engage in trading are to be regarded as subject to the jurisdiction of the courts, then, it is suggested that this must be by virtue of the common law, since on the courts' own interpretation of the Act, official staff do not enjoy 'any manner of benefit by this Act'. There is no authority on the question whether official staff engaging in trading do or do not, in fact, enjoy immunity, but it is probable, I suggest, that the courts would regard them as being in the same position as domestics and domestic servants.

³¹ [1928] A.C. 433, at p. 447.

³² (1854) 14 C.B. 487.

³³ (1859) 2 E. & E. 94.

In considering the present scope of diplomatic immunity in English law, it is apparent that little or no assistance can be derived from the provisions of the Diplomatic Privileges Act, 1708. As Goddard, L.J., as he then was, has said³⁴: 'The Statute of Anne is declaratory in the first, second and third sections, and it really does not achieve any additions to the law by the subsequent sections'. The present scope of diplomatic immunity will be discovered, not in legislation, but in judicial decisions which will be examined shortly.

However, although the legislature has apparently exercised little or no influence on the law relating to the immunities of diplomatic persons, it has played an important part in recent years in extending diplomatic immunity to certain non-diplomatic persons and organisations. This extension, which is of recent growth, is due to the establishment of international organisations and tribunals designed to secure international peace. Sir Cecil J. B. Hurst drew attention to this modern development in diplomatic immunity in 1929.³⁵ He pointed out that, in his opinion, the purpose of diplomatic immunity is to enable a representative to maintain relations between the sovereign whom he represents and the sovereign to whom he is accredited, and that, in view of the tendency to amalgamate consular and diplomatic services, the executive should bear this in mind in determining who is entitled to diplomatic status.³⁶

In view of this, he continued, it might seem strange that, of recent years, immunities have been conferred upon members of international arbitration tribunals and representatives of Members of the League of Nations and officials of the League. He concluded that, although the expression 'diplomatic immunity' was perhaps unfortunate in these cases, since the organisations and persons affected were not concerned with diplomatic purposes, nevertheless the expression achieved the justifiable purpose of indicating that they were immune from local jurisdiction. Justifiable, in the case of arbitrators, owing to the fact that the tribunals might sit in the territory of one disputing State, and

³⁴ *The Amazone* (1940) 56 T.L.R. 266, at p. 268.

³⁵ See 'Diplomatic Immunities—Modern Developments', *British Year Book of International Law* (1929), Vol. 10, p. 1 *et seq.*, reprinted in *The Collected Papers of Sir Cecil J. B. Hurst* (1950), pp. 111–126.

³⁶ For the conclusiveness of the Foreign Office certificate on a question of diplomatic status, see p. 103, *post*.

it was important that the parties should appear in a position of equality before it and essential that the members of the tribunal should be independent. Justifiable, in the case of the League of Nations, since the purpose of the League was to promote peace and improve relations between States, and for this purpose independence was essential.

At the present time the immunities which certain international organisations and officials possess are enjoyed in England by virtue of the International Organisations (Immunities and Privileges) Act, 1950, and Orders in Council having effect thereunder.³⁷ This Act, which came into force on the day it received the Royal Assent, *viz.*, July 12, 1950, consolidates without amendment the earlier Diplomatic Privileges (Extension) Acts, 1944, 1946 and 1950. Under the Act, the privileges and immunities set out in the Schedule are conferred upon such international organisations as may be specified by Order in Council,³⁸ and persons connected therewith (s. 1), lists of persons so entitled being published (s. 2). Judges of and suitors to the International Court of Justice (s. 3), and representatives attending international conferences (s. 4), may also be privileged. Section 5 provides for reciprocal treatment. Necessary as this wide extension of diplomatic immunity may be, on the grounds specified by Sir Cecil J. B. Hurst above, it is important to regard all such extensions with a watchful suspicion, for it must be remembered that whenever immunity is conferred upon one person, other persons are automatically deprived of enforceable rights.

So much for the part played by the legislature in the development of diplomatic immunity. We must now consider the part played by the judiciary in the same field.

THE JUDICIARY AND DIPLOMATIC IMMUNITY IN ENGLISH LAW

As we have seen, the immunities of diplomatic persons depend almost entirely on the common law, since the Diplomatic

³⁷ See S.R.O. 1947, No. 1772; S.I. 1948, No. 2253; 1949, Nos. 133, 134, 136, 834, 835, 837, 1831, and 2190; and 1950, No. 515, made under the Diplomatic Privileges (Extension) Acts, 1944 and 1946, and saved by section 1 of the 1950 Act; and S.I. 1950, No. 1268 (Council of Europe), made under section 1 of the 1950 Act.

³⁸ See footnote 37, *supra*.

Privileges Act, 1708, has been interpreted in a restrictive spirit and regarded as not exhaustive. An examination of judicial decisions on diplomatic immunity fails to reveal any fundamental basis for the immunity which will help us to determine its scope. Thus, it has frequently been stated that the basis of the doctrine is the fiction of extraterritoriality, that is, the fiction that a diplomatic representative remains for all purposes on the soil of the country which he represents. This fiction is, perhaps, useful in that it indicates that for most purposes a diplomatic representative must be treated as outside the territory of the receiving State, but it does not appear to be an invariable principle whereby the question of immunity or no immunity in any particular case can be answered. Indeed, because the fiction is but a fiction and untrue in fact, and would lead to absurd results if pressed to its logical conclusion, the modern tendency is towards rejecting the doctrine of extraterritoriality and towards explaining the immunity by reference to a waiver of jurisdiction by the receiving State.³⁹

This theory, although probably more accurate, leaves us with the question: In what cases will a receiving State, in our case the United Kingdom, waive its jurisdiction in favour of a diplomatic representative? It is with the attitude of the judiciary towards this question that we are now concerned. One of the principal difficulties, however, in the way of considering diplomatic immunity in English law, and possibly one of the reasons for the absence of a fundamental principle, is that many aspects of the problem never come before the courts at all because the executive prevents judicial action being taken. For this reason it is impossible to do more than hazard an opinion as to what the English law may be on certain points.

At the outset it must be noted that whether any person possesses diplomatic status is nowadays a question for the executive, as we shall see later.⁴⁰ Nevertheless, this practice is a modern one and from time to time in the past the courts have given decisions in which the holders of particular posts have been recognised as possessing diplomatic status and, so, enjoying

³⁹ For a discussion of the juridical basis of diplomatic immunities, see Montell Ogden, *Juridical Basis of Diplomatic Immunity* (John Byrne & Co., 1936), and see, also, *The Collected Papers of Sir Cecil J. B. Hurst* (1950), pp. 195-204.

⁴⁰ See p. 103, *post*.

immunities. For convenience it is desirable to divide the persons who enjoy diplomatic status into four classes. First, the ambassador himself, in the wide sense in which that word is sometimes used, who may be either an ambassador in the narrower and more technical sense, or a minister plenipotentiary and envoy extraordinary, or a minister resident, or a chargé d'affaires. Secondly, persons officially attached to the ambassador as members of the embassy. Thirdly, persons in the private service of the ambassador. Fourthly, members of the ambassador's family.

(1) *Diplomatic envoys*

All ambassadors possess identical privileges and immunities whether they be ambassadors in the technical sense or ministers plenipotentiary, or ministers resident or chargés d'affaires. This division of ambassadors into different categories is important only in connection with questions of rank and honour. However, it must be noted here that it has been held that the High Commissioners accredited by the Dominions do not enjoy diplomatic status and, therefore, do not enjoy immunity either at common law or under the Act of Anne⁴¹; High Commissioners enjoy immunity only so far as it has been expressly conferred on them as such by Act of Parliament.⁴² Furthermore, the representatives of a government recognised as the *de facto* government only and not accorded recognition as the *de jure* government, do not appear to enjoy diplomatic status and immunities in English law; *Fenton Textile Association v. Krassin*.⁴³ Subject to the above, all ambassadors, whatever their rank and status, enjoy precisely the same immunities and privileges.

⁴¹ *M. Isaacs v. Cook* [1925] 2 K.B. 391. However, according to a notice published in the *London Gazette* dated December 24, 1948, the question of the style and precedence of the High Commissioners of Commonwealth countries was discussed during the 1948 Conference of Commonwealth Prime Ministers, and, as a result of conclusions reached at that conference, the notice continued, His Majesty has been pleased to direct that on all ceremonial occasions the High Commissioners, together with Ambassadors of Foreign States, should rank immediately after the Lord Privy Seal in order of seniority of appointment, and the High Commissioners should be granted the style of 'Excellency' in the United Kingdom. It is possible that this may make a difference to the attitude of the Foreign Office should they be consulted by the courts in the future, and this could result in the overruling of *M. Isaacs v. Cook*.

⁴² See p. 96, *post*, as to immunity from taxation conferred by the Finance Acts, 1923, s. 19, and 1925, s. 26. See also p. 102, *post*, as to exemption from customs duties.

⁴³ (1922) 38 T.L.R. 259.

The only immunity, however, which can be regarded as having been conclusively established by judicial decision, is immunity from civil jurisdiction. No civil action of any sort can be brought against a person enjoying diplomatic status. The mere issue of a writ of summons commencing proceedings, apart from any question of service of it or proceeding to judgment or executing the judgment, is null and void according to *Musurus Bey v. Gadban*⁴⁴ and *Magdalena Steam Navigation Co. v. Martin*.⁴⁵ In the latter case it was argued that judgment on a debt should be given, so that execution could take place if and when the envoy ceased to enjoy diplomatic status. This plea was rejected by the court, Campbell, C.J., saying that this could produce no benefit to the plaintiff and would at the same time seriously inconvenience the defence, and that, furthermore, since the writ of summons could not be served in the ambassador's house and he could not be stopped in the street and served, it was impossible to see how the action could be commenced.

This proposition, that the mere issue of a writ of summons is void, seems, however, to be incorrect. The writ would appear to be not void, but voidable by the ambassador. The ambassador may avoid the proceedings by pleading immunity. On the other hand, if the ambassador does not plead immunity but enters an appearance and allows the action to proceed without pleading immunity, he is deemed to have waived his immunity.⁴⁶ As already stated, this provides a striking illustration of the way in which the provisions of the Diplomatic Privileges Act, 1708, have been rendered nugatory by judicial interpretation.

Section 3 of that Act, it will be recalled, provides that writs issued against ambassadors shall be null and void and yet, by virtue of judicial decisions, the proceedings are not void but merely voidable at the option of the envoy. However, even though the envoy waives his immunity down to judgment, he can still plead immunity as a bar to execution of the judgment, unless he waives his immunity to execution as well: *Re Suarez, Suarez v. Suarez*.⁴⁷ This principle gives the ambassador ample time to change his mind should he regret waiver.

Furthermore, since an ambassador enjoys immunity, not

⁴⁴ [1894] 2 Q.B. 352.

⁴⁵ (1859) 2 E. & E. 94.

⁴⁶ See, for example, *Dickinson v. Del Solar* [1930] 1 K.B. 376.

⁴⁷ [1917] 2 Ch. 131; [1918] 1 Ch. 176.

because of any personal attribute but because of his position as a representative of his Sovereign, it is a well-settled principle that the immunity can only be waived with the consent of the Sovereign whom he represents: *Engelke v. Musmann*.⁴⁸ Presumably, also, the Sovereign can waive the immunity on his own initiative even against the will of the envoy. This seems to be a logical consequence of the proposition that the immunity is that of the Sovereign. Certainly, the immunity of a member of the envoy's official staff can be waived without the official's consent (*R. v. Kent*),⁴⁹ and there seems to be no valid reason for distinguishing between an envoy and a member of his official staff in this respect. If an ambassador purports to waive his immunity, it is not clear what steps the court will take to see whether the consent of the Sovereign has been obtained, but it would appear that such consent will be assumed by the court: *Re Republic of Bolivia Exploration Syndicate*⁵⁰; *Re Suarez*.⁵¹

In addition to the judicially recognised case of waiver, various writers on international law have suggested other exceptions to the principle of immunity from civil jurisdiction. Thus, it is said, if an ambassador himself commences proceedings in court, he must submit himself to the jurisdiction of the court *in toto*, and must, therefore, be subject to the jurisdiction in respect of any set-off which may be claimed against him. There is no English authority for this, but it seems to follow from the fact that this is the position with regard to State immunity; see *South Africa Republic v. La Compagnie Franco-Belge*⁵² and *Union of Russian Soviet Socialist Republics v. Belaiew*⁵³; but no more can be recovered from the State by this means than the State itself has claimed.⁵⁴ Whether or not an ambassador, who himself commences court proceedings, can be compelled to give security for costs appears to be unsettled.⁵⁵

Another alleged exception to the principle of immunity from civil jurisdiction, is that the courts have jurisdiction over

⁴⁸ [1928] A.C. 433, at p. 450. See, also, *Fisher v. Begrez* (1833) 2 C. & M. 240, at p. 243; *Dickinson v. Del Solar* [1930] 1 K.B. 376.

⁴⁹ [1941] 1 K.B. 454.

⁵⁰ [1914] 1 Ch. 139.

⁵¹ [1917] 2 Ch. 131; [1918] 1 Ch. 176.

⁵² [1898] 1 Ch. 90.

⁵³ (1925) 52 T.L.R. 21.

⁵⁴ Order 21, rule 17.

⁵⁵ *Duke de Montelana v. Christie* (1816) 5 M. & S. 503; *Brazil (Emperor) v. Robinson* (1837) 6 A. & E. 801.

immovable property held in this country by an envoy, not in his official capacity but as a private individual.⁵⁶ There is no binding judicial authority for this alleged exception and it would appear that, in practice, the distinction between official and private capacity would be difficult to make. On the other hand, it must be noticed that in *Magdalena Steam Navigation Co. v. Martin*,⁵⁷ Campbell, C.J., referred to the envoy as having no real property in England, an allegation which it was apparently considered necessary to plead. Nevertheless, the alleged exception clearly cannot be said to be recognised by English law.

A final exception arises in some countries where the envoy carries on trading activities, but it is well established that immunity from jurisdiction still exists in England even though the ambassador engages in trade. Although, as we have seen, section 5 of the Diplomatic Privileges Act, 1708, provides that persons in the service of the envoy who carry on trading activities shall lose their immunity, it has been held that this provision does not apply to the envoy himself: *Magdalena Steam Navigation Co. v. Martin*.⁵⁸ In this respect diplomatic immunity and State immunity correspond.⁵⁹

Immunity from civil process results inevitably in immunity from direct taxation and rates, since the payment of these cannot be enforced by action or by distress: *Parkinson v. Potter*⁶⁰; *McCartney v. Garbutt*.⁶¹ A similar immunity from taxation, though not from rates, has been conferred by statute⁶² upon High Commissioners representing the Dominions, although, as we have seen, they do not in fact enjoy diplomatic status and immunities.⁶³ It may be noted here that, with respect to the exemption from income tax granted to high officials of certain international organisations by the Diplomatic Privileges Acts, 1944 and 1946,⁶⁴ and Orders in Council made thereunder,⁶⁵ an

⁵⁶ See, for example, Oppenheim, *International Law* (7th ed. by Lauterpacht), Vol. 1, p. 716.

⁵⁷ (1859) 2 E. & E. 94.

⁵⁸ (1859) 2 E. & E. 94.

⁵⁹ See *Krajina v. Tass Agency* [1949] 2 All E.R. 274.

⁶⁰ (1885) 16 Q.B.D. 152.

⁶¹ (1890) 24 Q.B.D. 368.

⁶² Finance Acts, 1923, s. 19, and 1925, s. 26.

⁶³ See p. 93, *ante*.

⁶⁴ Now replaced by the International Organisations (Immunities and Privileges) Act, 1950.

⁶⁵ See S.R. & O. 1947, No. 1772; S.I. 1948, No. 2253; S.I. 1949, Nos. 133, 134, 136, 834, 835, 837, 1049, 1428, 1831 and 2190.

Order in Council was made coming into force on April 4, 1950, to make it clear that the exemption applies only to emoluments from those organisations and not to emoluments from other sources.⁶⁶ There appears to be no similar limitation with regard to the emoluments of diplomatic envoys.

Exemption from civil jurisdiction and all civil process is, then, well-established. The position with regard to criminal liability is, however, not so clear. In works on international law it is usually stated that persons enjoying diplomatic status are exempt from criminal jurisdiction as well as civil jurisdiction. There is, however, not a single judicial decision in English law which can be regarded as laying down that proposition. On the other hand, there is no case in which a foreign diplomatic agent has been subjected to criminal liability in this country, except where his government have waived immunity on his behalf. The probable explanation of this lack of judicial authority is that it is not the policy of the executive to initiate criminal proceedings against persons enjoying diplomatic status, and for this reason the courts have never been called upon to adjudicate upon the matter. It would seem to be implicit in the provisions of section 3 of the Diplomatic Privileges Act, 1708, that an envoy is immune from both civil and criminal jurisdiction, but too much reliance cannot be placed upon this provision in view of the judicial attitude towards the Act.

Sir Cecil Hurst criticises the statement in *Halsbury's Laws of England* that exemption from the jurisdiction of the criminal courts is not sanctioned by the decision of any English court or any authority on English law.⁶⁷ This statement, he says, is inconsistent with the decision in *R. v. Guerchy*.⁶⁸ With due respect, it is submitted that *R. v. Guerchy* is no authority for Sir Cecil Hurst's criticism. As he himself says,⁶⁹ the facts of that case were that an indictment of the French ambassador was stopped by the issue of a *nolle prosequi*. But this does not prove that diplomats are exempt from criminal liability in English law. No decision was reached by the court. At the most it proves that the executive is in favour of exemption from criminal

⁶⁶ Diplomatic Privileges (General Amendment) Order in Council, 1950, No. 515.

⁶⁷ *The Collected Papers of Sir Cecil J. B. Hurst* (1950), p. 225.

⁶⁸ (1765) 1 Wm. Bl. 545.

⁶⁹ *Ibid.*, p. 217.

liability, and it may, in fact, be read as indicating only that the executive in this one case thought it impolitic to allow the prosecution to proceed. Furthermore, it might well be argued they would not have troubled to enter a *nolle prosequi* if they had thought that the court would itself have dismissed the charge, on the ground that an ambassador was exempt from criminal jurisdiction.

It would appear from the fairly recent case of *R. v. Kent*,⁷⁰ that English law on this point is doubtful. In that case a clerk in the U.S. embassy was convicted of offences under the Official Secrets Acts, and for larceny. However, immunity was waived and the clerk was dismissed and, therefore, the question whether immunity from criminal proceedings would have existed but for the waiver and dismissal did not have to be decided. Lord Caldecote, L.C.J., said⁷¹: 'I find it unnecessary to decide whether or not the diplomatic privilege of the character discussed before us can be claimed by a member of a diplomatic staff in connection with a criminal charge'. Probably the question will never be decided by the courts owing to executive policy in not initiating prosecutions in the case of diplomats. If the question ever does come before the courts, then the consensus of opinion amongst writers on international law, the tendency of the courts to regard the rules of international law on diplomatic immunity as a part of the common law,⁷² and the provisions of the Act of 1708 seem to suggest that the courts would favour exemption from jurisdiction.⁷³

It is often said that diplomatic immunity carries with it a further privilege, namely, immunity of domicile. It is contended that no act of jurisdiction or administration can take place within the residence of a diplomatic envoy except by permission of the envoy.⁷⁴ This again seems to be a matter of State practice, a question of the attitude of the executive,⁷⁵ and there is con-

⁷⁰ [1941] 1 K.B. 454; 110 L.J.K.B. 268; 28 Cr.App.R. 23; 57 T.L.R. 307.

⁷¹ [1941] 57 T.L.R., at p. 308.

⁷² See, for example, *The Amazone* (1940) 56 T.L.R. 266.

⁷³ For a discussion of the question, whether international law is *ipso facto* part of the common law, see *Halsbury's Laws of England* (Hailsham ed.), Vol. 6, p. 510, and see, also, *Journal of Comparative Legislation*, Vol. 13, p. 134, and works there referred to in footnote 1.

⁷⁴ See, for example, Oppenheim, *International Law* (7th ed. by Lauterpacht), Vol. 1, p. 713.

⁷⁵ See p. 102, *post*.

sequently little judicial authority on the question. A case in point which, perhaps, sheds a little light on the question is the case of *Alla Abranova*.⁷⁶ In this case the Paddington coroner was reported to have decided not to hold an inquest on Alla Abranova, the three year old daughter of a Soviet consulate official, who died after being injured in a fire at the annexe to the Soviet embassy in Kensington Gardens on January 13, 1949. 'The Russians', he is reported as having said, 'have requested diplomatic immunity. The Soviet embassy is not within my jurisdiction and therefore no inquest is being held by me. That, I believe, is the legal position'. The decision of the coroner on such matters is, of course, final, but the case cannot be regarded as a binding authoritative precedent. However, the question is primarily one of State practice and will, therefore, be considered further below.

So much for the attitude of the courts towards diplomatic envoys. We must now consider the immunities of the official staff, private staff, and family of the envoy.

(2) *Staff officially attached to a diplomatic envoy*

In general, it may be said that members of the embassy are as inviolable as the envoy, and enjoy precisely the same immunities as he himself enjoys. There are, however, certain differences and additional features which must be noticed. First, the immunity of a member of the official staff may be waived not only by himself with the consent of his Sovereign, as is the case with envoys, but also by the head of the mission, the envoy, against the will of the person sued or prosecuted: *Re Republic of Bolivia Exploration Syndicate*⁷⁷; *Dickinson v. Del Solar*⁷⁸; *R. v. Kent*.⁷⁹ As already mentioned, it is highly probable that the immunity of the envoy can be similarly waived by his Sovereign without the consent of the envoy, so that this is a difference of degree rather than of kind. Whether the immunity of the member of the legation may be waived by the ambassador without reference to the Government, in criminal as well as in civil proceedings, is, however, doubtful.⁸⁰ Secondly, it is possible

⁷⁶ [1949] *The Sunday Times*, January 16.

⁷⁷ [1914] 1 Ch. 139.

⁷⁸ [1930] 1 K.B. 376.

⁷⁹ *Supra*, n. 70.

⁸⁰ See Oppenheim, *International Law* (7th ed. by Lauterpacht), Vol. 1, p. 725. See, also, *R. v. Kent* [1941] 1 K.B. 454.

that a member of the embassy, other than the envoy, has no immunity if he engages in trading activities. Possibly, however, this applies only to domestics and domestic servants.⁸¹

(3) *Private servants of the envoy*

Similarly, the private servants of the envoy enjoy, in general, the same immunities as their employer. They are, in fact, in precisely the same position as members of the legation, except that in their case it is quite clear, and not in the least doubtful, that by virtue of section 5 of the Diplomatic Privileges Act, 1708, they have no immunity if they engage in trading activities.

The appointment as a servant must, of course, be bona fide and not merely for the purpose of avoiding suit: *Re Cloete*.⁸² In addition, many of the older cases indicate that servants only enjoy immunity where it is necessary for the proper performance of the envoy's functions. Thus, in *Taylor v. Best*,⁸³ Maule, J., drew a distinction between suits which affect the comfort and dignity of the Minister, and those which do not so affect him. He said that 'where these are not interfered with the ambassador is not affected by the suit and consequently the servant has no privilege'.⁸⁴ Again, in *Novello v. Toogood*,⁸⁵ the privilege of the ambassador's servant was held to have been conferred in order that the ambassador might not be disturbed in his dignity or personal comfort.

As was said in *Parkinson v. Potter*,⁸⁶ diplomatic immunity extends to subordinates, only 'where it can be shown that it is claimed in the interests of the ambassador as necessary to the exercise of his functions and his comfort and convenience'.⁸⁷ However, it is difficult to envisage circumstances in which such an allegation could be refuted. Furthermore, in view of the case of *Engelke v. Musmann*,⁸⁸ in which the House of Lords laid it down that questions of diplomatic status are matters for the Crown to settle, it seems doubtful whether these older cases, dealing with bona fide employment and interference with the

⁸¹ See p. 89, *ante*.

⁸² (1891) 7 T.L.R. 565.

⁸³ (1854) 14 C.B. 487.

⁸⁴ *Ibid.*, at p. 524.

⁸⁵ (1823) 1 B. & C. 554.

⁸⁶ (1885) 16 Q.B.D. 152.

⁸⁷ *Ibid.*, at p. 155.

⁸⁸ [1928] A.C. 433.

ambassador's functions, are of any importance at the present day.⁸⁹

Finally, it may be noted that a servant does not lose his privilege simply because he is a British subject, *McCartney v. Garbutt*.⁹⁰ This is so, even though the servant is a personal servant. 'Once a man is tendered as a domestic or as a domestic servant and the tender is accepted, the status is created and the privilege attaches'.⁹¹

An important question which arises is, 'Which servants enjoy diplomatic immunity?' The answer to this question is provided not by the judiciary but by the executive now.

(4) *The family of the envoy*

The family of the envoy enjoy diplomatic immunity to the same extent as private servants of the envoy. It is not clear what members of the family come within this privilege, but it is probably limited to his wife and children living with him under his roof. The International Organisations (Immunities and Privileges) Act, 1950, limits the immunities conferred by that Act upon the families of representatives in international organisations to the wife or husband and children under 21⁹² and, probably, diplomatic immunity is limited in the same way. Again, since the decision in *Engelke v. Musmann*, this is probably a question for the executive, not the judiciary.

In considering the immunities conferred by judicial decisions, it remains to note that the immunity does not cease immediately the envoy ceases to hold office. The immunity continues for a reasonable time after the termination of the diplomatic mission, in order to enable the envoy to wind up his official business: *Magdalena Steam Navigation Co. v. Martin*⁹³; *Musurus Bey v. Gadban*⁹⁴; *Re Suarez*.⁹⁵ Presumably, therefore, the privileges of the members of his family, and the members of his suite, continue also for a reasonable time after the termination of the mission. However, in *R. v. Kent*,⁹⁶ it was pointed out that this

⁸⁹ See p. 103, *post*.

⁹⁰ (1890) 24 Q.B.D. 368.

⁹¹ *Engelke v. Musmann* [1928] A.C. 433, at p. 451.

⁹² See the Schedule to that Act.

⁹³ (1859) 2 E. & E. 94.

⁹⁴ [1894] 2 Q.B. 352.

⁹⁵ [1917] 2 Ch. 131; [1918] 1 Ch. 176.

⁹⁶ [1941] 1 K.B. 454.

principle does not apply to the case of an official of an embassy after dismissal from his post, and waiver by his ambassador or home State. This case distinguishes termination of the diplomatic mission from the case of waiver by the ambassador and dismissal.⁹⁷

THE EXECUTIVE AND DIPLOMATIC IMMUNITY IN ENGLISH LAW

The executive plays an important part, probably a more important part than the other two organs of government, in shaping diplomatic immunity. Attention has already been drawn to one or two aspects of diplomatic immunity where the formulative influence has been that of the executive, and the judiciary has had little or no part to play. Thus, as already mentioned, there is no judicial authority for the proposition that diplomats are immune from criminal liability; immunity depends upon the policy of the executive in not commencing criminal proceedings against those enjoying diplomatic status, except where immunity is waived as, for example, in *R. v. Kent*.⁹⁸ Again, it has been pointed out that immunity of domicile, so far as it exists, depends to a great extent upon the policy of the executive in not seeking to exercise jurisdiction, through, for example, the police, inside embassy buildings. An example of the influence of the executive on the extent of this immunity is afforded by the case of the Chinese Sun Yat Sen, which occurred in London in 1896. Sun Yat Sen, a political refugee from China, was induced to enter the Chinese embassy in London and was kept there under arrest for the purpose of being conveyed forcibly to China. The British Government intervened and, despite the contention of the Chinese envoy that the house of the legation was Chinese territory and the British Government had no right to interfere, demanded his release. Their demands were complied with after several days.

Another illustration of the effect of the executive on diplomatic immunity, is afforded by the practice with regard to customs duties. There is no judicial authority for exempting diplomatic envoys from customs duties, but it is apparently the practice to admit the baggage of envoys without customs

⁹⁷ See (1941-1942) 5 *Modern Law Review*, pp. 64-66 for an examination of this case by G. Schwarzenberger.

⁹⁸ [1941] 1 K.B. 454.

examination.⁹⁹ In addition, it must not be forgotten that the legislation extending diplomatic immunity to non-diplomatic persons is formulated by, and introduced into Parliament by, the executive as a result of treaties and arrangements to which the executive has previously agreed.

By far the most important part which the executive plays with regard to diplomatic immunity, is that relating to diplomatic status, a jurisdiction which has been voluntarily surrendered to them by the courts. In the case of *Engelke v. Musmann*¹ in 1928, the House of Lords established once for all the proposition that whether or not a person is entitled to diplomatic status is a question for the Crown. Whether or not that diplomatic status carries with it diplomatic immunity is, of course, still a question for the courts to decide, but in considering the diplomatic status the courts accept the statement of the Foreign Office as conclusive and refuse to make an independent inquiry into the facts.

Although the case of *Engelke v. Musmann* concerned an official member of the embassy staff, the decision does not seem to be limited to the case of official staff. It appears to extend also to private servants and members of the envoy's family. Thus, Lord Buckmaster said²: 'When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which, in the person of the ambassador himself and equally of his wife and family and staff, it would obviously be undesirable to institute'. Lord Phillimore spoke in similar terms, saying,³ 'Once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches'. It has been pointed out that the doctrine has been established only within the last two or three decades,⁴ but, nevertheless, the doctrine is now finally and fully established and can only be altered by the intervention of the legislature.

The question remains, whether the doctrine is desirable and beneficial or not. It may well be contended that it deprives the courts of practically all control over questions of diplomatic

⁹⁹ See Ham's *Year Book* (Customs) (1928), ii, pp. 50, 51, 106, for particulars of this practice.

¹ [1928] A.C. 433; 44 T.L.R. 731.

² *Ibid.*, at p. 444.

³ *Ibid.*, at p. 451.

⁴ See A. B. Lyons, 'The Conclusiveness of the Foreign Office Certificate' *British Year Book of International Law* (1946), Vol. 23, p. 240.

immunity, and adds dangerously wide powers to the already extensive powers of the executive. Nevertheless, the doctrine has been generally welcomed on the ground that questions of diplomatic status require tactful handling, which is better undertaken in the tranquillity of a Government office than in the publicity of a law court.⁵ However, as Sir Cecil Hurst has pointed out,⁶ although the practice is open neither to doubt nor to useful criticism, the important question does remain, 'On what principles are the executive to determine who is to have immunity?' The same writer concludes that since the purpose of diplomatic immunity is to enable the representative to maintain relations between the Sovereign whom he represents and the Sovereign to whom he is accredited, immunity should be limited by that purpose.

The amalgamation of the consular and diplomatic services into a common foreign service, which has taken place in many countries in recent years, raises difficult problems since a consul is not engaged in maintaining relations between States but in assisting his fellow countrymen, mainly on a commercial basis. The recent developments which have taken place as regards the scope of the tasks imposed upon diplomatic missions, and as regards the categories of persons engaged on international work who should be free from subjection to local jurisdiction, have greatly extended the scope and importance of diplomatic immunity and involve, perhaps, the formulation of a new approach to the whole problem.

CONCLUSION

This leads me to my conclusions on the problem. Diplomatic immunity is embracing an ever-widening number of persons. The question requiring to be answered is whether that immunity has now become too wide. If, indeed, the purpose of, and justification for, the immunity is to enable relations to be maintained between States and to enable international work to progress without fear of bias, then there seems to be a case for arguing that the immunity is now too wide. There seems to be little justification, for example, for extending immunity to cases of

⁵ 'Diplomatic Immunities—Modern Developments', by Sir Cecil Hurst, *British Year Book of International Law* (1929), Vol. 10, p. 1 *et seq.*

⁶ *Ibid.*

trading activities. It is obvious that those who enjoy diplomatic status, and others engaged on international work, should be free from the fear of arrest on trumped-up charges and from other frivolous actions which may interfere with their work, but it is by no means easy to see why such persons should be free from liability, *e.g.*, for breach of promise of marriage or for negligence in driving a motor vehicle. This seems to constitute an unwarrantable contravention of the doctrine of the Rule of Law. It may, of course, be said that the persons affected may be relied upon not to abuse their powers, an argument so often put forward when wide powers and immunities are demanded. It may also be argued that the Government affected could be relied upon to waive the immunity in any case where their representative abused it. This argument was put forward in the case of *Parker v. Boggan*,⁷ where the question for decision was whether the fact that a proposed sub-lessee was entitled to diplomatic immunity and, therefore, could not be compelled in a court of law to comply with the covenants in the lease, was a reasonable ground for the landlord refusing consent to the underlease. It was held that it was unreasonable to withhold consent, Macnaghten, J., saying⁸: 'Counsel for the landlord has argued that it is an objection that the proposed sub-tenant has diplomatic privilege. Some people might regard it as an advantage . . . most people would feel that it was reasonably certain that all the obligations into which he entered would be fully discharged, and that, if he did not discharge them the Turkish Empire, for its own credit and reputation, would certainly see that they were discharged to the full'. It is respectfully submitted that although it was no doubt true in the particular case that the Turkish embassy would see to it that the sub-tenant fulfilled his obligations, the fact nevertheless remains that any dispute between the parties could not be brought before the courts unless immunity was waived.

It must be borne in mind that not all disputes are simple of solution and that not all nations are on friendly terms at all times. There may well be what is thought to be a justifiable case for non-performance of alleged obligations, and a refusal to submit the matter to the court for that reason. There may well be a case where a government unreasonably refuses to waive

⁷ [1947] 1 All E.R. 46.

⁸ *Ibid.*, at pp. 46-47.

immunity. Attention may, perhaps, be drawn to the recent case of *Krajina v. Tass Agency*,⁹ where the plaintiff sued for damages for an alleged libel which appeared in an article in the *Soviet Monitor*, published by the Tass Agency. The defendants pleaded State immunity and succeeded. Although this case concerned State, not diplomatic, immunity, as Tucker, L.J., pointed out,¹⁰ the case illustrates the potential hardship which may be caused by immunity from jurisdiction.

However, bearing in mind that the immunities seem wider than is necessary to achieve their purpose, and that they are enjoyed by increasingly wide categories of persons and bodies, and that they may cause great hardship to individuals, the apparently simple step of restricting the present scope of the immunity is probably impracticable. In the first place, it would be difficult to draw the dividing line between cases where immunity is necessary if the diplomat is to perform his functions, and cases where it is not. In the second place, if this country were to restrict immunities to cases where it was felt to be necessary, then clearly it could only be done in agreement with other countries who would insist upon adopting a like policy.

The consequence would be that a diplomatic agent abroad, in countries where the powers of the administration are not slight, would, in the words of Sir Cecil Hurst,¹¹ 'be at the mercy of interruptions which might be caused to his task by an unscrupulous abuse of the powers of the local administration and of the machinery which must exist in every State for the settling of disputes between private persons'. As the same writer points out,¹² the danger would be a real one since 'The duties which a foreign diplomatic representative has to perform are in many cases far from easy and his communications far from welcome to the State to which they are made'. Practical politics seem to require that, in this case, the theory of equality before the law in this country should give way completely to the exigencies of the international rule of law.

⁹ [1949] 2 All E.R. 274.

¹⁰ *Ibid.*, at p. 281. See, also, H.L. Deb. 55, Vol. 165, cols. 926-942, where the Lord Chancellor pointed out, in referring to the *Tass Agency Case*, 'this was not a case in which they claimed a diplomatic privilege or immunity at all; in this case they claimed State privilege'. As a result of this debate, an inter-departmental committee was set up to consider the problem of State immunity. This committee has not yet reported.

¹¹ *The Collected Papers of Sir Cecil J. B. Hurst* (1950), p. 174.

¹² *Ibid.*

TRUSTS IN THE CONFLICT OF LAWS

G. W. KEETON

ALTHOUGH the subject which has been selected for discussion in this paper affords an excellent theme for the lawyer, it is a little surprising that, in this country at any rate, it is briefly treated by legal writers. It is true that in England, unlike the United States, we may not be handling, daily, trusts which have operation outside state borders. Nevertheless, having regard to the fact that, from the standpoint of the English courts, Scotland is a foreign jurisdiction, and remembering also the frequency with which persons dying in England hold property in a dominion, it is somewhat unexpected to find that decisions upon questions of conflict of laws in this field are extremely rare. Yet it is not difficult to think of a wide variety of possible problems, and even the primary question of jurisdiction raises questions upon which there is very little clear authority.

PENN V. LORD BALTIMORE

It is an obvious and necessary general principle of the conflict of laws that no court will entertain an action for the determination of the title to, or the right to possession of, land situated out of England, or for the recovery of damages for trespass to such foreign land. In the latest edition of Dicey's *Conflict of Laws*, there is a full discussion of the possible origin of this rule in English law, but it is self-evident that if any other rule were to prevail, it might have the consequence that English courts would be concerned to secure the execution of decrees which operated directly within the territorial orbit of another state—a situation which would produce many inconvenient consequences. Nevertheless, there exist two important exceptions to this general rule, both derived from the practice of the old Court of Chancery in respect of its equitable jurisdiction, especially in relation to trusts. The first of these exceptions was established by the decision of Lord Hardwicke in *Penn v. Lord Baltimore*,¹ and it arises out of

¹ (1750) 1 Ves.Sen. 444.

a logical application of the maxim, 'Equity acts *in personam*'. It is that an English court of equity has jurisdiction to hear an action against a person in respect of land situated out of England, if that action arises out of a contract or out of an equity between the parties. Thus, in *Penn v. Lord Baltimore*, the suit in Chancery arose out of the grant of a charter in respect of land situated in British North America, which, from the standpoint of the English court, was foreign land. The entire scope of this jurisdiction was defined by Parker, J. (as he then was), in a well-known passage in his judgment in *Deschamps v. Miller*,² where he says: 'In my opinion, the general rule is that the court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule; but, without attempting to give an exhaustive statement of those objections, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract, fiduciary relationship, or fraud, or other conduct which, in the view of a court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages, or in the case of land obtained by the defendant by fraud or other such unconscionable conduct as I have referred to, the court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not, according to the law of the *locus*, the claim of title set up by one party, whether a legal or an equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think that the court ought to entertain jurisdiction to decide the matter'.

It will be seen, therefore, that the whole foundation of this jurisdiction rests upon the breach of an equitable obligation *in personam* by a person whom the court can reach, namely, one who is, whether permanently or temporarily, within the juris-

² [1908] 1 Ch. 856. See, also, *Gorash v. Gorash* [1949] 4 D.L.R. 296 (Canada).

diction of a court of equity.³ Even so framed, the rule governing this jurisdiction has been criticised as going very far, when the rules upon which the conflict of laws is founded are considered. As Lord Esher put it, 'It seems to be open to the strong objection that the court is doing indirectly what it dare not do directly',⁴ and Dicey,⁵ Falconbridge and others have pointed out that if the jurisdiction were pressed it could very well lead to embarrassing conflicts with the courts of the *situs*.

It is undeniable that in the present century courts of equity have shown a caution that was not always apparent in the eighteenth and early nineteenth centuries, although Professor Hanbury's suggestion that the jurisdiction is now limited to cases where the land, which is the object of the proceedings, is actually British territory is unduly restrictive. Indeed, in principle, this could scarcely be the position, for Professor Cheshire, who discusses the limits of the principle of *Penn v. Lord Baltimore* very fully, points out that this jurisdiction *in personam* is not limited to cases affecting foreign land. Such cases are simply specific instances of the invocation of a general jurisdiction *in personam*, which has been used to issue injunctions to restrain foreign proceedings,⁶ and even to restrain a person from taking advantage of a foreign judgment, obtained in violation of equitable principles.⁷ In all such cases the test is neither the nationality of the defendant nor the place where the property, whether movable or immovable, is situated, but merely whether the defendant is within the jurisdiction of the court, so that he can be reached by the court's decree. It is in the exercise of this far-reaching jurisdiction that it is possible to trace the last survival of the high status of the Court of Chancery, and of those administrative powers which were such a striking feature of its jurisdiction in former times. Even so late as 1838, Shadwell, V.C., said in *Bent v. Young*,⁸ 'I consider that in the contemplation of the Court of Chancery every foreign court is an inferior court', and although a modern equity judge might not express himself so forcibly,

³ *Ewing v. Orr-Ewing* (1883) L.R. 9 A.C. 34, at p. 40.

⁴ *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q.B. 358, at pp. 404-405.

⁵ 6th ed., p. 147.

⁶ E.g., *Portarlington v. Soulby* (1834) 3 My. & K. 104. See, also, *Cohen v. Rothfield* [1919] 1 K.B. 410 and *Orr-Lewis v. Orr-Lewis* [1949] P. 347.

⁷ E.g., *Ellerman Lines, Ltd. v. Read* [1928] 2 K.B. 144.

⁸ (1838) 9 Sim. 180, at p. 191.

many of the consequences of that former pre-eminence remain.

Both Dicey and Cheshire emphasise the fact that although the jurisdiction is very wide, there are, nevertheless, important limitations. In the first place, there is the overriding consideration that there must exist some personal equity between the parties. This limitation, therefore, excludes any possibility of adjudicating upon direct questions of title to land situated abroad. Further, either the defendant must be present in England or, if he is not so present, the court must be able to reach him by service of a writ or notice (as, for example, where a person domiciled or ordinarily resident in England is for the time being out of England). Thirdly, the equitable jurisdiction will not assist if the decree granted would be directly contrary to the *lex situs*. This, however, is by no means as easy to determine as might appear at first sight. It is clear, for example, that if the equity recognised by the English court of equity is entirely unrecognised by the *lex situs*, the court will grant a decree. This is established by a long line of cases, of which the most important of the earlier ones is *Ex p. Pollard*,⁹ and one of the latest is *Re Anchor Line (Henderson Bros.) Ltd. (No. 2)*.¹⁰

Finally, it must be pointed out that the jurisdiction cannot, in general, affect third parties. Equity will only proceed against the actual person whose own conduct has brought him within the orbit of the court's jurisdiction. This is described by Cheshire as 'privity of obligation', between plaintiff and defendant, arising out of some transaction between them. The plainest illustration of this is *Norris v. Chambres*.¹¹ In that case, Sadleir, an Englishman, contracted to buy land in Prussia from Simons (also an Englishman) and paid a deposit. Simons refused to complete, and sold to Chambres, who bought with notice of the earlier contract in favour of Sadleir. Sadleir's representative then brought an action in England, claiming he was entitled to an equitable lien on the land, arising out of his contract. In Prussia, no such equitable lien existed. Sir John Romilly, M.R., held that as the decree would necessarily affect the rights of Chambres, who was not a party to the original contract out of which the equity arose, no decree would be granted; Sadleir must obtain

⁹ (1840) Mont. & Ch. 239, at p. 250.

¹⁰ [1937] Ch. 483.

¹¹ (1861) 29 Beav. 246.

redress in the Prussian courts, or fail. This was upheld on appeal to the Lord Chancellor.¹² However, if third parties themselves become affected by the personal equity, they may be made the objects of a decree. This occurred in *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*,¹³ where a company had created an equitable charge in favour of debenture holders, and had then sold land 'subject to the mortgage lien or charge now subsisting'. The mortgage was void under the *lex situs* for want of registration, but the English court granted a decree against the purchasers at the suit of the debenture holders. Once this distinction is made, however, a difficulty arises. Granted that in the later case the purchase was expressly subject to the charge, nevertheless in *Norris v. Chambres* the sale was admitted to be made to a purchaser who had notice of a prior contract, and who might therefore have been reasonably regarded as affected by the equitable obligation. Although in *Mercantile etc. Trust v. River Plate Trust*, Davey, Q.C., *arguendo*, said that the case was exactly covered by *Norris v. Chambres*, North, J., did not refer to that case in his judgment, nor did he endeavour to solve the difficulties it raised. Certainly, if North, J.'s, judgment is read, it is hard to resist the inference that *Norris v. Chambres* was wrongly decided, since the effect of *Chambres* purchasing with notice of the prior contract does not seem to have been appreciated.

THE CONVERSE OF PENN V. LORD BALTIMORE

What is the attitude of an English court when presented with a situation which is the converse of *Penn v. Lord Baltimore*, i.e., when a foreign court grants a decree, based on a personal equity between the parties, but affecting land situated in England? One might think that such a situation might arise not infrequently. Nevertheless, no decision on this point exists in the reports of English courts. There is, however, a decision of the Supreme Court of Canada, *Duke v. Andler*,¹⁴ which was fully discussed by Mr. D. M. Gordon in the pages of *The Law Quarterly Review*¹⁵ in 1933. Briefly, the decision in that case was that a decree of a Californian court, affecting land situated in British

¹² Followed in *Norton v. The Florence Land Co.* (1877) 7 Ch.D. 332.

¹³ [1892] 2 Ch. 303.

¹⁴ [1932] S.C.R. 734.

¹⁵ 49 *L.Q.R.* 547.

Columbia, and arising out of fraud by the defendant, would not be recognised by the courts of British Columbia. On principle, the decision is hard to challenge. The Californian court, in pronouncing its decree, was adjudicating on personal equities between parties to the suit, and it must make its decree effective without the aid of any foreign court. This point was clearly put by Lord Cottenham, L.C., in *Ex p. Pollard*,¹⁶ where he says: 'If, indeed, the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but where there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, act upon their own rules, and are not influenced by any consideration of what the effects of such contracts might be in the country where the lands are situated, or of the manner in which the courts of such countries might deal with such equities'.

Mr. Gordon also points out that although American authority on this problem is not extensive, in two cases, *Carpenter v. Strange*,¹⁷ and *Fall v. Eastin*,¹⁸ the Supreme Court has decided that a decree *in personam* of a state court affecting title to real estate in another state is destitute of extraterritorial effect.

ADMINISTRATION OF AN ESTATE WHICH INCLUDES IMMOVABLES SITUATED ABROAD

It has never been doubted that where executors or trustees are administering the estate of a person who died leaving property within the jurisdiction, the court has jurisdiction also to decide matters relating to property, whether movable or immovable, situated abroad. In this case, the English court of equity will even decide questions of title. Although, as Dicey points out, this rule, or rather exception to a general rule, has never been precisely defined, there is, nevertheless, abundant authority to support it. Moreover, it is a principle quite distinct from that in *Penn v. Lord Baltimore*, for in the case of the administration of estates with assets abroad, no question of fiduciary relationship or personal equity need arise at all. One or two illustrations will make the scope of the rule clear.

¹⁶ (1840) Mont. & Ch. 239, at p. 250.

¹⁷ (1890) 141 U.S. 87.

¹⁸ (1909) 215 U.S. 1.

In *Lord Nelson v. Lord Bridport*,¹⁹ the King of the Two Sicilies had granted land in Sicily to Lord Nelson and the heirs of his body, with power to appoint successors by will. By his will, which also extended to Lord Nelson's property in England, he devised land to trustees for his brother for life, with various remainders. After Lord Nelson's death, the Government of the Two Sicilies passed a law, the effect of which was to invalidate these provisions of the will, and to make the persons in possession of the land the absolute owners thereof. In accordance with this law, the admiral's brother devised the land to his daughter, but the remainderman under Lord Nelson's settlement claimed the land under the settlement. The English court held that it possessed jurisdiction to settle this question, arising as it did under the original will, but it also held that the law applicable was the *lex situs*. Accordingly, the daughter of the admiral's brother was entitled to the estate, as against the claim of the remainderman under the admiral's will.

*Re Piercy*²⁰ is a further illustration of the application of the same principle. Piercy, a domiciled Englishman, was the owner of land in Sardinia. He made an English will, by virtue of which he devised and bequeathed all his real and personal estate to his executors and trustees, on trust to sell and convert it, and to hold the bulk of the proceeds for his children for their lives, with remainders to their issue. By Italian law, disposition of the land by will was invalid. North, J., held that he had jurisdiction to determine who was entitled to the land in Sardinia. So far, there was no difficulty, but the actual decision of North, J., in this case on the application of Italian law has been subjected to considerable criticism. Thus, Cheshire,²¹ accepting Beale's criticism, and applying in its entirety the principle that rights over land are governed by the *lex situs*, comments: 'The unsophisticated might conclude that the land must be allowed to remain subject to Italian law, and that any move to subject it, directly or indirectly, to the English trusts would be contrary to principle as being a contravention of the *lex situs*. North, J., however, was of a different opinion. He did, indeed, consent to the land being subject to Italian law as long as it remained unsold, but,

¹⁹ (1845) 8 Beav. 527.

²⁰ [1895] 1 Ch. 83.

²¹ *Conflict of Laws*, 3rd ed., p. 730.

apart from that concession, he directed the trustees to sell the land and to hold the proceeds upon the trusts declared by the will. His reasoning, ingenious if not sound, was that by Italian law it was not illegal for the testator to direct the sale of his land, that Italian law *qua* the *lex situs* would continue in accordance with the general principle to govern the land in the hands of the purchaser, but that it had nothing whatever to do with the proceeds of sale, for by that time the land would have been placed outside the scope of the will.

‘ This doctrine of severance, by which the two main parts of the will were broken up, leaves something to be desired. It savours a little of a device to exclude the *lex situs*. It was surely essential that the will should stand or fall as a whole. Italian law ordained that the land should not be used as the source for the creation of “ trust substitutions ”, yet that is precisely what North, J., countenanced. No doubt, as he said, the trustees had clear power by Italian law to sell the land if directed to do so by the testator. But was it so clear that they were entitled to sell it for the particular purpose indicated? What probably weighed with the learned judge was that the land had become money under the equitable doctrine of conversion, but, as Beale points out, whether such a conversion had been effected depends upon the *lex situs*, and by Italian law the answer was most definitely in the negative ’.

The second paragraph of this criticism is extremely difficult to follow. Careful perusal of North, J.’s judgment fails to reveal the slightest indication that he was influenced by the equitable doctrine of conversion, which is never mentioned. Conversely, there is evident throughout the judgment a most careful regard for the effect of Italian law, in so far as it is applicable to the will. There is no suggestion in Italian law, so far as it was stated in argument or judgment, that the trustees have power to sell for one purpose, and not for another; and further, Dr. Cheshire, in arguing that the will should stand or fall as a whole, apparently overlooks the fact that the will applied to both real and personal estate, and that, since the law governing the movables was English law, no question was, or could be, raised upon its efficacy in respect of movables. North, J.’s problem was therefore to discover what could be ranked as movables for the purposes of the trusts.

The solution of this problem, it may be hazarded, was not as easy as Beale and Cheshire suggest. One of the difficulties in cases of this type is to discover exactly what the foreign law is. The relevant sections of the Italian Code were set out in the case. They established the following rules :

1. Succession by law or will, whether as regards the order of succession, or as to the measure of the rights of succession, or as to the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question, whatever the property or wherever it may be situated.

2. The substance and effect of testamentary dispositions are regulated by the national law of the persons making them.

3. But, notwithstanding the preceding rules, in no case may the laws, acts or judgments of a foreign country, nor any private dispositions, derogate from the prohibitive laws of Italy concerning either the persons, property or the acts, nor from the laws in any way concerning public order and morality.

4. Any condition imposed on an heir or legatee, no matter how expressed, that he is to retain property and hand it to a third person, is a trust substitution, and as such, is forbidden.

5. The invalidity of a trust substitution does not effect the validity of the institution of the heir or legatee, to which it is attached. But all trust substitutions are void.

After considering the provisions of the code, and the opinions of Italian jurists, North, J., decided that the devise to the trustees, and the trust for sale were valid, but since by Italian law there could be no trust substitution, the attempt to settle the children's shares was not, in so far as it related to Italian land, valid, and the interests of the children were therefore absolute. The points in issue in the case were, therefore, to what trusts the purchase money resulting from sale of the land, and the rents and profits until sale, were subject.

North, J., attacks the problem in the following way. He says it is not necessary to decide whether the trustees or the children are heirs, since either way the will is good. If the trustees are heirs, then under rules 4 and 5, they take, but everything else is trust substitution and, therefore, invalid. On the other hand, if the children, not the trustees, are heirs, then they take, but subject to the power given to the trustees by Sardinian law, to sell, without interference on the part of persons interested in the estate.

Either way, therefore, the trustees are empowered to sell the land. When they sell it, the proceeds are to be invested in English securities, and held by the English trustees in favour of certain beneficiaries named by the will. It then enjoys the same status under the will as any other movables. It is interesting to notice that North, J., dealt with the specific objection that patrimonial land sold is still, by Italian law, patrimony. So it is, says North, J., if in fact the person in whom the proceeds of sale vest is subject to Italian law. But the English trustees are not.

It is respectfully suggested, therefore, that the argument of Beale and Cheshire does not accurately reflect the successive steps in North, J.'s judgment, which turns upon a direct application of Italian law to the land. Once the land has been sold, the English will necessarily governs the actions of the English trustees with regard to the proceeds of sale, as much as it does with regard to other movables.

In a recent case, *Re Duke of Wellington*,²² the English court of Equity again accepted jurisdiction to decide questions of title to foreign land. Once again the question, as in *Nelson v. Bridport*, arose out of a grant of foreign estates to one of our two great commanders during the Napoleonic wars. The first Duke of Wellington was also created, by the Spanish monarchy, Duke of Ciudad Rodrigo in 1812, and there was a grant of Spanish estates to the Duke of Ciudad Rodrigo, his heirs and successors. No problems upon the devolution of this estate arose until 1943, when the sixth Duke of Wellington and Ciudad Rodrigo was killed in action, being then a bachelor. Thereupon the Dukedom of Wellington passed to the uncle of the sixth Duke, and the Dukedom of Ciudad Rodrigo to the sister of the sixth Duke. By a Spanish will, dated May 6, 1942, the sixth Duke had devised and bequeathed his Spanish estates and personalty to the person who, being issue of the first Duke of Wellington and Ciudad Rodrigo, 'will, on my death, become Duke of Wellington and Ciudad Rodrigo, for his absolute benefit'. He also made an English will, dated December 6, 1942, disposing of the remainder of his property, and excepting therefrom the property disposed of by the Spanish will. The English court of Equity held that it had jurisdiction to decide this question, and on the

²² [1948] Ch. 118, C.A.

question of the law applicable, the Court of Appeal accepted the reasoning of Wynn-Parry, J., at first instance.

As far as the Spanish will was concerned, Wynn-Parry, J., held that the gift failed, since there was no one who could satisfy the description contained in it. Accordingly, it was necessary to determine in whom the movables and immovables disposed of by that will vested. As far as movables were concerned, the law applicable was English law, since the testator was domiciled in England. The immovables, however, were governed by Spanish law, and the determination of who, under Spanish law, was entitled was a matter of complexity, involving the question whether Spanish law recognises and applies the doctrine of *renvoi*. After receiving expert evidence, which conflicted in important particulars, Wynn-Parry, J., decided that it would be contrary to the spirit of the Spanish Civil Code to hold that in such a case Spanish law would accept the *renvoi* which the English law makes to it as the *lex situs*. Accordingly, the question was decided by reference to English law. The gift in the Spanish will having failed, the present Duke of Wellington was entitled under the English will to the Spanish property, both immovable and movable, ineffectually disposed of under the Spanish will.

CHARITABLE TRUSTS SITUATED ABROAD

A quite separate group of problems arises with respect to the administration of charitable trusts situated abroad. Here, problems of administration, involving the proper control of trustees, sometimes present insoluble difficulties. A good illustration of this is afforded by *New v. Bonaker*.²³ A testator, domiciled in England, bequeathed North American Stock to the President and Vice-President of the United States, and the Governor of Pennsylvania, upon trust to build a college in Pennsylvania where moral philosophy should be taught, and that a professor should be engaged to inculcate and advocate the natural rights of the black people of every clime and country until they should be restored to an equality in civil rights with their white brethren throughout the Union. The will was made in 1825, and the testator died in 1828, but there was a provision for accumulation of income, so that it was not until 1861 that proceedings were

²³ (1867) L.R. 4 Eq. 655.

instituted. Prior to their institution, however, there had been correspondence with the President and Vice-President of the United States, and with the Governor of Pennsylvania, all of whom had declined the trust, on the ground that it was of doubtful utility, and that the fund was in any case inadequate. Unless the inadequacy is so great, however, as to amount to impossibility of performance, this is no ground for the court to refuse to give effect to a trust, nor will the fact that the named trustees disclaim bar its execution, since others should then be selected. Malins, V.C., accepted both these propositions, but, somewhat optimistically, suggested that 'the real object which this testator had in view was the promotion of civil equality between the blacks and whites in the United States, and that object . . . is already accomplished by the political events which have recently taken place'. This, however, was not the sole ground of the decision. He took the refusal of the three officials named in the trust to be an indication that the trust was unacceptable in the United States, and, therefore, incapable of achievement. This seems to be a sound conclusion on the facts.

On the other hand, in *Re Robinson*,²⁴ the testator devised and bequeathed the residue of his property to the German Government for the benefit of German soldiers disabled in the First World War, with an alternative gift, if the first should be void, to General Smuts for the benefit of Boer soldiers disabled in the South African War. Here, the object being charitable, and the trustees named being willing to accept, the court held that there was no power to direct a scheme. In such cases, where the trustee is abroad, the practice was to hand over the fund, to be applied to the trusts of the will. Where, however, the trustee is in England, but the trust is to be administered abroad, the court will direct a scheme; and in *Re Colonial Bishopricks Fund* ²⁵ the court directed the *cy-près* modification of a charitable scheme, where a general charitable intent had been shown, but the original object could no longer be achieved.

THE PROBLEM IN THE UNITED STATES

Although the cases which have been mentioned above do not exhaust the list of those in which problems of the conflict of laws

²⁴ [1931] 2 Ch. 122.

²⁵ [1935] Ch. 148.

have arisen, it is believed that they are a representative selection, covering the main rules evolved by the English courts. It will at once be apparent that they are simply specific rules, evolved to meet particular difficulties. They do not reflect, or form part of a fully-developed system, and it is a matter for remark that they deal with so few of the many possible situations which may possibly arise. For example, the question of interpretation of trust instruments from the standpoint of conflict of laws has only arisen incidentally (as it did, for example, in *Re Duke of Wellington*),²⁶ and has never been fully examined. This circumstance becomes all the more remarkable when the *American Restatement on the Conflict of Laws*, or Chapter 15 of Professor Shattuck's edition of *Loring's Trustee's Handbook* is examined from the standpoint of American practice. In the United States, problems involving conflict of laws questions in respect of trusts are almost of daily occurrence, since a very large number of considerable trusts may be expected to operate on property, and in respect of beneficiaries, situated beyond the territorial limits of the state in which the trust was established. The American decisions, therefore, form an extremely valuable storehouse from which the English lawyer may derive frequent guidance. To analyse even the most important of these decisions adequately would require a volume in itself. Only one or two general rules may therefore be noticed very briefly, remembering that there may be important qualifications in the laws of particular states. In the first place, on the question of jurisdiction, a distinction must be drawn between trusts of personal property on the one hand, and trusts of real property on the other. Again, in so far as trusts of personal property are concerned, there is a distinction between testamentary trusts and trusts *inter vivos*.

Where there is a trust of land, whether testamentary or *inter vivos*, the courts of the *situs* of the land have exclusive jurisdiction, and they will apply their own law in all matters relating to the validity of a trust, and of the interests in land erected by it, and finally, in all matters relating to the administration of the trust. If a trust comprises both real and personal property, questions of validity are determined by the courts, and in accordance with the law appropriate for each type of property.

²⁶ And see *Re Pilkington's Will Trusts* (1937) 106 L.J.Ch. 360; and *Lindsay v. Miller* [1949] A.L.R. 200 (Victoria).

Where there is a testamentary trust of personal property, the courts of the state in which the trust is intended to be administered have jurisdiction. The intent is gathered either from the words of the will, or from the surrounding circumstances. Thus, unless the will otherwise provides, the courts of the state in which the testator was domiciled at the time of his death have *exclusive* jurisdiction, and even if a trustee is residing in another state at the time when the will becomes operative, the courts of that state may decline to exercise jurisdiction over the trustee. This rule, however, is subject to the qualification that, if a suit is to be instituted against a defaulting trustee, it may be instituted where the trustee is to be found, and if the court of such a state makes a decree, the courts of the *situs* of the trust will recognise it.

Where testamentary trusts of personal property are concerned, the law governing the validity of the trust is the law of the testator's domicile at the time of his death. In so far as the administration of such a trust is concerned, however, the law most frequently applicable is the law of the state where the trustee is intended to execute the trust. The primary presumption here is that this law is the law of the testator's domicile, but this may be rebutted, *e.g.*, where the testator nominated as trustee a trust corporation situated in another state. Here the probability is that the law applicable is the law of the state where the trust corporation is situated. The law of the state of administration, for example, will govern such matters as the incidents attaching to the beneficiaries' interests, and also the range of trustee investments.

The rules for the selection of the law governing the validity of *inter vivos* trusts are less clear than those governing testamentary trusts, and practice has varied at different times, and from state to state. The *Restatement on Conflict* suggests that the law applicable is the law of the *situs* of the property at the time when the trust is created, but a number of other rules have been and are being applied by the courts. In some cases, for example, the law of the trustee's domicile, or the law of the state where the trust is to be administered, has been selected. The question of the law governing *inter vivos* trusts becomes even more complicated when it is realised that the law governing the *administration* of such a trust may be different from the law governing its validity, and that even with regard to the law

governing administration there are many difficult problems. Thus, the court will often be guided on this question by the settlor's intention, express or implied, but where this cannot be determined, such factors as the domicile of the trustee or of the settlor may be the deciding factor.

There are, moreover, abundant decisions upon the question of the law governing the interpretation of the trust instrument—a question which, as we have seen, the English courts have only considered incidentally. Some of the distinctions drawn are somewhat fine. Thus, the law of the settlor's domicile governs the construction of the language used to create the trust, as, for example, where the words used are precatory. Moreover, where an interest is given to A, with remainder to B, the law of the settlor's domicile will again govern the meaning of the expressions used. On the other hand, where an interest is given to 'A and his heirs at law', one jurisdiction has decided that the phrase 'heirs at law' should be construed in accordance with the law of the beneficiary's domicile.²⁷

Sufficient has perhaps been said to show the possible range of questions which arise for solution in respect of trusts in the conflict of laws, and there has been opportunity for only a brief reference to American practice. This, however, is by no means the end of the inquiry, for the decisions of the Commonwealth of Australia and the Dominion of Canada also offer opportunities for a wider study of this question, and for comparison with our own limited range of decisions.²⁸

²⁷ *Codman v. Krell* (1890) 152 Mass. 214, 25 N.E. 90; see, too, Shattuck, p. 309.

²⁸ The American literature on trusts in the conflict of laws is extensive. Land's *Trusts in the Conflict of Laws* (1940) contains a full discussion of the problems. See also 'Some Aspects of Trusts in the Conflict of Laws' by Lester G. Hoar in (1948) 26 *Canadian Bar Review*, p. 1415. For the views of a recent English writer, see Croucher, 'Trusts of Movables in Private International Law' (1940) 4 *Modern Law Review*, p. 111.

THE MECHANICS OF LAW-MAKING

CECIL CARR

In 1835 there was published a little book entitled *The Mechanics of Law-Making*, written by Arthur Symonds and 'intended for the use of legislators and all other persons concerned in the making and understanding of laws'. Either by sheer coincidence or by some innocent trick of memory, Sir Courtenay Ilbert, whose writings do not mention Symonds, chose the very same title for his Carpentier Lectures at Columbia University in 1913. When Symonds wrote, he could have adopted Bentham's familiar description of the chaos of our statute law: 'As if from a rubbish cart, a continually increasing and ever shapeless mass of law is from time to time shot down upon the heads of the people, and out of this rubbish, and at his peril, is each man left to pick out what belongs to him'.

When Ilbert wrote, some eighty years after Symonds, legislative method had been brought to its present technique. The influence of Bentham had taken effect, through the efforts of Brougham and some of the Victorian Lord Chancellors, and through the devotion of less famous labourers in the statutory vineyard. Browsing casually among the *Parliamentary Papers* one comes upon references to these pioneers. A glance back at some of them today will recall the gradual improvement which we owe to their almost anonymous endeavours.

Symonds was Benthamite in tradition and sympathy. His writings reprehend those imperfections which the Master had castigated; they recommend remedies which he had propounded. An editorial note, dated January, 1839, prefixed to Bentham's *Nomography*, after observing that the Government had at last paid attention to the subject, gave credit to the work of Symonds, mentioned his plan for the improvement of British statutes (laid before Parliament in the previous August) and summarised his principal points.

All that the *Parliamentary Papers* tell us about his life is little

enough. He gave evidence in 1836 before a Select Committee appointed to consider the expediency and practicability of some scheme for the more careful preparation, drafting and revision of Public Bills. He said he had attended to the framing of laws for seven or eight years and especially to the mode of working in the House of Commons; he mentioned the publication of his *Mechanics of Law-Making* in the previous year and he offered some second thoughts. Asked about his qualifications, he replied that he had been educated as an attorney but was now private secretary to Mr. Poulett Thomson. He had studied legislation with a view to making it his profession, and had quitted legal practice to employ himself in parliamentary business. Poulett Thomson, afterwards Lord Sydenham, was at this time President of the Board of Trade, a department which, especially during the feverish activity of Railway Bills, was heavily concerned with legislation.

In 1838 the Board of Trade employed Symonds, with James Booth, to classify the Private Bills and to prepare drafts of General Bills and model forms of Special Bills on such topics as railways, inclosures, joint stock companies and the acquisition of land; these were to replace the multitudinous clauses then swelling the pages of the Private Acts. The two collaborators disagreed over the method of approach, and it was left to Booth, by that time established as Counsel to the Speaker, to fix the final form of the *Clauses Consolidation Acts* of 1845 and to bring brevity and uniformity into local legislation; they were computed to have saved 100,000 pages during the next six or seven years. In 1838 Symonds wrote to Poulett Thomson a long letter which begins nearly 300 pages of the 'Papers relating to the drawing of Acts of Parliament and to the means of ensuring the uniformity thereof in language, in form, in arrangement and in matter', presented to Parliament. The state of the law, he said, had been a topic of ridicule and sarcasm for fifty years. In one of his Appendices he printed an anthology of scornful comments, including Gulliver's exposition of the English Constitution to the Houyhnhnms: 'This society has a peculiar cant and jargon of their own that no other mortal can understand and wherein all their laws are written, which they take care to multiply'.

These papers by Symonds, if they describe in detail the defects of the law, can mention recent instances of improvement.

He had found evidence of a greater simplicity and brevity of style. James Deacon Hume (whom, for this purpose, the Treasury had relieved of all his duties as Controller of Customs for three years) had consolidated hundreds of customs statutes into ten intelligible Acts. In these, which received the Royal Assent in 1825, he had abbreviated the titles, initiated the use of an interpretation clause, and employed marginal notes and a tabular form of statement. The Attorney-General had lately cut the preambles out of some Bills on law reform. Symonds appended specimens of remodelled Acts and some interesting 'Regulations for drawing statutes' and 'Illustrations of rules of construction'. He actually drew up a short Bill for his drafting regulations; he realised 'the natural and well grounded jealousy of the Houses of Parliament', and he proposed that the authorities to enforce the regulations should be the Lord Chancellor, Speaker, Home Secretary and the Chairmen of Committees in the two Houses. They would give directions for the printing of Acts. But, most of all, he wanted uniformity. He saw the various departmental draftsmen all working differently. The Revenue Departments had one style, the Woods and Forests another, the Home Office another and the Irish Office another, and every individual member who brought in a Bill had a different plan.

In 1856, when the Statute Law Commission was making its series of reports to Lord Chancellor Cranworth, in favour of employing some expert official or board to prepare, revise and report upon Bills, Symonds offered his services. He was so impatient as to write twice within the next fortnight to ask when an answer might be expected. The Commission regretted their inability to employ him at present as proposed; he repeatedly asked to be heard in explanation, but his offer was declined with thanks and we hear no more of him.

Some of his contemporaries, who also had devoted themselves to the theory and practice of law-making, were more lucky. Bellenden Ker, for instance, laboured as member or servant of various bodies, each worth a brief mention in our story. He was a paid member of the Royal Commission of 1833, to which Brougham assigned the task of digesting into one statute all the enactments about crime, trial and punishment, and into another statute all the common law on the same subject, of reporting on the prospect of combining both the resultant statutes into one

body of criminal law which would repeal and replace all the outstanding provisions, and, further and finally, of reporting how far any other branches of existing statute law could be consolidated.

A fellow of the Royal Society (until he resigned), recorder of Andover, a conveyancer in good practice who had been called to the bar in 1814 and had been active in promoting the Reform Bill, Ker gave evidence before the same Select Committee as Symonds in 1836. He mentioned, incidentally, that he had recently been drafting a Bill (doubtless for Brougham) to divide the office of Lord Chancellor. Ker put forward a plan for a board of three who, with some outside help, would digest the whole of the law in five or six years, though it might take the whole of one session to get the digest enacted by Parliament. Brougham's Royal Commission duly produced its criminal law digest, and Brougham introduced it as a Bill. He withdrew it, however, on an undertaking by Lord Chancellor Lyndhurst to have it examined by a second commission. Of Brougham's successive frustrations we need not speak, but Ker was one of the five members of this second body.

In 1853 Lord Chancellor Cranworth, who had learnt from the judges that they were not anxious to have the criminal law codified, announced his intention to devote himself to a systematic programme of improvement of the statute law. For this purpose he appointed, experimentally for twelve months, a paid Statute Law Board with Ker at its head and five sub-commissioners. One of them was George Coode, whose paper on *Legislative Expression*, dated 1842, and prefixed to the 1843 report of the Poor Law Commissioners on Local Taxation, has obvious affinities with Bentham and Symonds. Another was Chisholm Anstey, afterwards an Irish M.P. and a follower of O'Connell, and eventually a successful practitioner at the Bombay Bar. A third was Warrington Rogers, later Solicitor-General in Van Diemens Land. The Board made three reports and produced some specimen Bills; Anstey and Rogers compiled an expurgatory list of defunct statutes, which was almost its only successful contribution to law-making, since it formed the basis of the earliest Victorian Statute Law Revision Bill.

The Board was superseded the following year by a permanent Statute Law Commission, with Ker as the only paid member.

It was understood, according to Cranworth, that, besides his duties as commissioner, Ker would help the Great Seal in drafting Bills and in keeping watch on Bills relating to the administration of justice. The Commission included several eminent judges, and amongst other authorities who attended its meetings regularly was Walter Coulson, Bentham's former amanuensis and protégé, a friend of James Mill and Francis Place. The Commission was dissolved in 1859.

Perhaps results had not seemed to justify expenditure. A parliamentary return shows that Ker drew over £10,000 in sixteen years, which does not seem excessive. Perhaps there were personal difficulties. Anstey and Coode took offence at possibly detrimental references to their labours in Ker's reports, Coode even trying to petition Parliament to inquire into the conduct of the Commission. Ker replied composedly. He retired from legal practice in 1860, living thereafter at Cannes, where he must often have listened to Brougham's retrospects of service to the cause of law reform. He died a few years before the appointment of the Select Committee of 1875 to consider 'whether any and what means can be adopted to improve the manner and language of current legislation'.

Lord Chancellors, Royal Commissions and Select Committees have done their best, but the complaints of the condition of the statute-book are not yet stilled. It remains a current legal problem. Arthur Symonds, to return to him, began his book with a Benthamite attack on verbiage. Take a pen, he said, and strike out every superfluous word. He applied this process to a few passages in recent Acts, printing the unnecessary words in italics; in one case he reduced sixty words to thirty-six, in another forty-three to eighteen. Many of his suggestions are echoes from Bentham. Why reiterate at the beginning of every clause 'And be it further enacted by the authority aforesaid'? Why repeat 'he or she', 'his or her', 'person or persons'? Let references to males include females; let the use of the singular cover the plural and vice versa. Why speak of 'The Lord Treasurer or any three or more of the Commissioners of H.M. Treasury for the time being' when 'The Treasury' would suffice?

Some of these practical suggestions were carried out in the 1850 statute, usually called Brougham's Act, 'for shortening the

language used in Acts of Parliament', itself replaced in extended form by the Interpretation Act of 1889, the modern draftsman's armoury of compendious expressions. Symonds, who had wanted a 'Statute of Constructions' for much the same purpose, partly to avert the tedious repetition of circumlocutory phrases and partly to negative some inconvenient rules of construction applied by the judges, ended his book with a Glossary of Proscribed Words and Phrases. This long list of tautologous expressions consisted mainly of otiose duplications like 'all and every', 'alter and vary', 'appoint and direct', 'approved and confirmed', 'attempt or endeavour', 'better and more effectually', 'cease and determine', and 'commence and take effect', ranging all the way down the alphabet to 'well and truly', 'will and pleasure' and 'wanton and malicious'.

That this process of austere curtailment can be reduced to absurdity we know from Benjamin Franklin's anecdote of John Thomson who, having served his apprenticeship to a hatter and wishing to set up business on his own account, wanted a sign-board for his shop. His first draft 'John Thomson, hatter, makes and sells hats for ready money', with a picture of a hat below it, was submitted to his friends for their criticism. 'The first he showed it to thought the word "hatter" tautologous, because followed by the words "makes hats", which showed he was a hatter. It was struck out. The next observed that the word "makes" might as well be omitted, because his customers would not care who made the hats. If good and to their liking, they would buy by whomsoever made. He struck it out. A third said he thought the words "for ready money" were useless, as it was not the custom of the place to sell on credit. Every one who purchased expected to pay. They were parted with, and the inscription now stood "John Thomson sells hats". "Sells hats?" said his next friend, "Why, nobody will expect you to give them away; what then is the use of that word?" It was struck out, and "hats" followed it, the latter as there was one painted on the board. So the inscription was reduced ultimately to "John Thomson", with the figure of a hat subjoined'. Franklin told that story to Thomas Jefferson who was sitting beside him in Congress and writhing a little because his famous draft of the Declaration of Independence was under fire. 'I have made it a rule', said Franklin, 'to avoid becoming the

draftsman of papers to be reviewed by a public body'.¹

There are times when obscurity results from using too few words rather than too many. Bentham, in spite of his tirades against longwindedness and overbulkiness, was willing to tolerate some slight relief from naked austerity. In his *Nomography* he allows force and harmony to be two perfections of the law, harmony having for its object and effect the affording of an agreeable sensation to the ear. In the *View of a Complete Code of Laws* he adds nobleness as a third perfection—a sort of eloquence of which the utility ought not to be despised, as it tends to conciliate the popular sanction. So he would allow the legislator to 'sprinkle here and there moral sentences, provided they were very short and in accordance with the subject'. It would show his paternal solicitude for those who must obey the law.

Perhaps it is in this spirit that, today, a great Education Act will begin by exhorting the Minister to promote education and pursue a national policy, and a Water Act will similarly admonish another Minister to look to our water resources and supplies. Symonds and others favoured legislation in general and abstract terms, whereas English statutes tended towards the minute enumeration of particular cases and express provision for every conceivable contingency. For this latter imperfection Bellenden Ker, in the Statute Law Board's final report, was prepared to lay the blame elsewhere. 'When a draftsman finds that it has been gravely questioned by a court of law whether a dead turkey can properly be described as a turkey, and whether an Act relating to convictions for stealing "horses" includes a conviction for stealing one horse, one can hardly wonder that he should give up all attempts at doing more than enumerating, to the best of his ability, all the particular instances he can think of, and stopping by express enactment all the misconstructions which it seems to him possible that perverse ingenuity may apply to the language he employs'.

Our Acts of Parliament, said Symonds, are written in the style of a foreigner who has learned the language out of a book with the aid of a grammar. George Coode, in his *Legislative Expression*, detected an unnatural note. There was a notion among amateurs that legislative language must be intricate and bar-

¹ See F. W. Hirst's classic *Life and Letters of Thomas Jefferson*, p. 125.

barous. 'Certain antick phrases are apparently thought by them to be essential to law writing'. The ready use of 'nevertheless', 'provided always', 'it shall and may be lawful and he is hereby authorised, empowered and required to', and 'anything in any Act or Acts to the contrary notwithstanding' seemed to be recognised qualifications for drafting statutes. There was no need, wrote Fortescue Brickdale, one of Ker's sub-commissioners in 1854, to invent a special language for Acts of Parliament; unsophisticated English was adequate for whatever the legislature could wish to express.

Some of the minor mechanics recommended by Symonds may deserve a further reference.

The subdivision of laws into numbered sections and into short sentences was one of Bentham's practical projects; the Bible offered a precedent with its numbered and chaptered verses. Symonds wanted to use 'section' and 'paragraph' for what we now call section and subsection; Bentham, with characteristic verbal invention, suggested a range of subdivision into section, bisection, trisection and quadrisection. Brougham's Act of 1850 required all Acts to be divided into sections. It was only by virtue of this, said Stephen in the introduction to his *Digest of the Criminal Law*, that a full stop could be introduced into a statute at all. Critics objected that the use of sections was a matter of printing, not of statutory direction; if an Act were not divided into sections, judges would not hold it invalid on that account. The Interpretation Act of 1889 contents itself with repeating a provision of Brougham's Act that 'every section of an Act shall have effect as a substantive enactment without introductory words'. Thus the reiterated formula 'and be it further enacted' could be omitted at last.

Seeking to save verbiage, Symonds wanted a more concise method of citing statutes; it should be possible to identify them by a 'short title' or by their regnal year and chapter instead of setting out their full title which often occupied ten lines at a time. Critics answered that a short title (for example, 'The Gasworks Clauses Act, 1847') left the reader in the dark; he would have to translate the calendar year into the appropriate regnal year, remind himself of the parliamentary session and ascertain the chapter number. As for the regnal-year-and-chapter method, they pointed out that printers sometimes made

confusing mistakes in printing the figures; and, anyhow, there was no need to legislate about the matter; judges really could be trusted to know what '1 & 2 Vict. c. 1' meant.

Short titles are common form in modern times, the House of Lords having required their insertion for facility of reference. An Act of 1896 (superseding an earlier Act of 1892) gives short titles to a long list of statutes which were not so christened when passed; more than a hundred other short titles were conferred by another Act in 1948. Quite lately a new facility of reference has been adopted in statutes; at the end of an Act there is appended a table of all the Acts referred to in its text, with all the appropriate references. Bentham would have praised that.

Not every expert was as enthusiastic as Symonds for the 'interpretation clause'. Critics conceded that ambiguous words in statutes ought to be defined, and that it was useful to employ some brief conventional symbol to save repeating lists of particulars or lengthy descriptions; but they disliked a 'parliamentary shorthand'. It was puerile, said Brickdale; if mere word-saving was all that mattered, why not leave out the articles 'a' and 'the' and other unimportant words? The chosen symbol-words were often arbitrary, and it puzzled the reader to remember that he had to apply the arbitrary and not the popular meaning. The critics said that the interpretation clause had become so fashionable that it was overworked. In the Clauses Consolidation Acts of 1845, though the drafting was otherwise good, many words were thus 'interpreted' when they could have no other meaning. The Lands Clauses Act and others made the unforgivable mistake of defining 'lands' as extending to 'hereditaments', whereas hereditaments, as every lawyer knew, included lands and other things like tithes and rights of fishery. It must be wrong, said the critics, to declare that the name of a species shall stand for the genus to which it belongs. The definition of 'land' as including hereditaments, however, found its way into Brougham's Act of 1850 and may have furnished the reason why a Bill was introduced next year to repeal that Act on the ground that it had caused more confusion than enlightenment.² Brougham complained of the definition of 'cattle' in the Towns Police Clauses Act; it included horses, asses, mules, sheep, goats and swine and never mentioned cows. There was trouble over the special

The definition survives in section 3 of the Interpretation Act.

definition of 'year' in an Act of 1838 for the sequestration of benefices where non-residence lasted for a year; the word had been defined as the period between January 1 and December 31.³ Today we are familiar with definition clauses which save space in lengthy statutes, though they are placed at the end of the Act in defiance of Brougham's insistence that a reader should never have to refer forwards; 'no term ought to be used', he said, 'which has not been accurately defined, and nothing should be laid down, to understand which it is required to read what follows'.

There is no time to linger over the mechanics of Symonds, or his formula for the lay-out of all statutes whereby he sought the uniformity which the Age of Reform demanded, or his Statute of Constructions which *inter alia* was to reverse the inconvenient common-law rule that a statute was revived if the Act which repealed it was itself repealed.⁴ There was a general problem, more grave and engrossing, for the Age of Reform to solve. For centuries Parliament had been depositing legislative strata, without offering any means of knowing whether any buried fragment at the bottom of what Bentham called the rubbish heap was alive or dead, or how far any one fragment was connected with another. A change in the law was accompanied not by a specific repeal but by some such deplorably vague phrase as 'any Act or Acts to the contrary notwithstanding'. Thus the abolition of the pillory was enacted in 1816 without eliminating existing references to this punishment; a few vestigial survivals of it remained to be combed out as recently as 1948. Symonds, who recommended the use of schedules to Acts, has the credit of having suggested that repealed enactments should be tabulated in a schedule.

The three principal remedies which the Age of Reform canvassed—codification, consolidation and expurgation—had been outlined by Francis Bacon two centuries earlier. The plan he proposed to King James in 1616 named the two parts of the work to be done, 'the digest or recompiling of the common law and that of the statutes'. The task for the statute law was four-fold—first, 'the Government to discharge the books of those

³ See 1 & 2 Vict., c. 106, s. 120, and *Bartlett v. Kirwood* (1853) 2 El. & Bl. 771.

⁴ This was dealt with by Brougham's Act in 1850, and is now taken care of by section 38 of the Interpretation Act.

statutes whereas the case by alteration of time is vanished'. The dead provisions might 'remain in the libraries for antiquities', but they, with the statutes long since expired and clearly repealed, must be omitted from the book of the law; 'if the repeal be doubtful, it must be so propounded to Parliament'. The second stage was 'to repeal all statutes which are sleeping and not of use but yet snaring and in force', the third to mitigate and modernise penalties, the fourth 'the reducing of convenient statutes heaped one upon another to one clear and uniform law'.

Bacon, we see, put expurgation before consolidation; Bellen-den Ker was not so sure, but Anstey and Rogers, having patiently compiled their expurgatory list (partly based on materials collected by Sir Henry Seton before he went out to India in 1826) agreed in effect with Bacon's priorities. The Anstey-Rogers list of 118 dead Acts eventually formed the substance of the forerunner of all modern Statute Law Revision Acts in 1856, popularly known as the Sleeping Statutes Bill. Its second reading was moved by Lord Fortescue, who pointed out that such enactments ought not to be allowed to slumber; they might at any moment be called into pernicious activity. Brougham, in his prodigious speech to the Lords on May 12, 1848, had told of such a case. In 1841 the Lancashire justices, having failed to convict some poachers under the Game Laws, elicited from the accused an admission that they had not been resorting to their parish church on Sundays, as required by an Act of 1558, and thereupon convicted and sentenced them for the non-attendance.

Those sleeping statutes, finally put to rest in 1856, were all enactments capable of inconvenient resurrection. There was 4 Hen. 4, c. 27, against the entertainment of any wasters, rhymers, minstrels or other vagabonds in Wales; 1 Hen. 6, c. 3, forbidding Irishmen to dwell in England unless they had a testimonial from the Lord Lieutenant; 22 Hen. 8, c. 10, directing that the outlandish people calling themselves Egyptians should, if they came within the Realm, forfeit their goods and depart on pain of imprisonment; 25 Hen. 8, c. 13, inflicting a fine for keeping more than 2,000 sheep; 26 Hen. 8, c. 6, prohibiting games of running or wrestling in Wales, and so on.

There had been doubt about having a declaratory statute to pronounce these archaisms really dead at last. Anstey and

Rogers were for it, Ker was against it; it was futile, said Ker, to ask the legislature to repeal what was not the law, many defunct Acts had better be left untouched, and some could not be repealed without awkward saving clauses. Presenting to the Statute Law Commission in 1856 a vast plan for the complete and simultaneous consolidation of all the statute law, the Attorney-General proposed to have a clause that all statutes not included in his consolidation were to be thereby repealed, though he confessed that there were some, for instance, Magna Carta and the Bill of Rights, which it would be a profanation to repeal and re-enact.

When the great consolidation Bills began to be framed under Ker's supervision, in supersession of a mass of existing laws, there was still a doubt about the repealing method. One school wanted repeals to be effected in a separate Act, as was done when the law of merchant shipping was consolidated in 1854⁵; if the object was to obtain official volumes of Revised Statutes containing only the living law, the repealed and the repealing enactments could both be omitted; they could be allowed, in Coode's words, to sleep together. Coode suggested that every amending Bill should be framed so as to reconsolidate the principal Act and then, having done its work, to be itself repealed. A Bill to ensure that this result was automatic, backed by Locke King amongst others, was introduced in 1850, but made no progress. The long series of Victorian Statute Law Revision Acts (some thirty between 1861 and 1898) habitually repealed all repealing enactments. The earlier Revision Acts are stated to be passed in contemplation of the publication of volumes of Revised Statutes, thus carrying Bacon's plan into effect. The first edition of such volumes began in 1870, a second was initiated in 1888 and a third has just appeared.

Consolidation, the second great remedy for the improvement of the statute book, was similarly encouraged by the prospect of officially producing the statute law in a tidier, more concise and cheaper form. Bellenden Ker advised that the process of consolidating should be a gradual and unhurried one. Others, like

⁵ Eden in his *Principles of Penal Law* (1771) had proposed to have statutes declaratory of the reformed criminal law and supplemental statutes repealing the old law; see Dr. Leon Radzinowicz, *History of English Criminal Law*, Vol. 1, p. 310. Hume had a separate repealing Act (6 Geo. 4, c. 105) when rewriting the customs laws in 1825: compare 8 & 9 Vict., c. 84; so also in 1861 the six criminal law consolidations were accompanied by a repealing Act (24 & 25 Vict., c. 95).

Anstey scorned 'fragmentary specimens'. Anstey wanted the work to be on 'a grand and complete scale'; he lost interest in digesting the insurance laws when he found it was not to form part of a great Statute of Contracts.

In 1856 the Attorney-General told the Statute Law Commission that the piecemeal method was 'radically defective and vicious'; he thought that complete consolidation could be carried through in twelve months if enough able and willing hands were employed; Parliament would be satisfied with nothing less. Ker and his colleagues debated how much amendment could properly be done while consolidating; ought not the exact words of the existing law to be reproduced, especially if judges had pronounced upon their meaning? Many able hands were recruited; an Archbold worked at the criminal law, a Wolstenholme at real property, and G. C. Oke offered to tackle the law of magisterial proceedings. Over ninety Bills were produced and carefully examined, but the criminal law consolidations of 1861 are almost the only successes. It is tragic to recall how much effort of this kind has been relegated to pigeonholes. It would be better, one commentator has said, to have half a dozen C3 consolidations than to wait ten years for one that is A1.

Some, like Brougham, regarded common law and statute law as inseparable. To collate these two kinds of law, naturally a longer process than consolidation of statute law alone, meant codification, of which Mr. Lloyd has given so admirable an account in *Current Legal Problems*.⁶ The digests, which were a fashionable ambition in their day, moved in that direction. Sir Mackenzie Chalmers used to say that there was no *tertium quid* between a textbook and an authoritative statute, and the best one could say for a digest was that it could be turned into a code. But was Parliament, asked Bellenden Ker, likely to enact codifications on the word of a draftsman that they were accurate and complete? It was idle to point to the triumphant revision of the laws of New York State in 1828. The conditions could not be compared. In New York the Legislature, the bar and the public were all enthusiastic for the code. The State devoted two special sessions of three months each to the exclusive purpose of examining and enacting the revision. The New York judges construed it liberally, disregarding minute objections. Ker

⁶ (1949), Vol. 2, pp. 155-172.

doubted if the English judges would be equally sympathetic. An overworked legislature like the British, heavily engrossed in national affairs and distracted by the fundamental differences of parties over political and social questions, would never find the time. It was, he said, notoriously indifferent to any considerations other than practical; controversy would flare up over topics like the relations between Church and State, the rights of property, the franchise and the death penalty, which created little excitement overseas. In Britain, as we know, the digest by Chalmers of the law of bills of exchange, and the digest by Sir Frederick Pollock of the law of partnership, owed their translation into statutes to the absence of controversy and to the support of the Institute of Bankers. Two other codifications by Chalmers (those of the sale of goods and marine insurance) overcame parliamentary indifference; but these four were brilliant exceptions. Even Stephen's draft statement of the law of evidence remained a digest and nothing more.

Consolidation has three natural enemies. The first, the shortage of available experts, is now in large measure countered by the present Lord Chancellor's arrangements. Symonds proposed that each department of the Government should set to work to rewrite the laws with which it was concerned; it is not so easy as that. The second enemy is the departmental preoccupation with day-to-day administration; nobody could attempt income tax restatement without the aid of the Inland Revenue, or summary jurisdiction without that of the Home Office; those are two very busy departments, though they are happily helping now with both those tasks. The third enemy is the fact that almost every consolidation Bill involves at least some element of amendment of the law; if a Bill admits this element, it invites every member of Parliament to add amendments of his own, so that the Bill may end by being smothered to death.

Sometimes, it is true, members resist the temptation, as when a smooth passage was given to the big Local Government Act in 1933 and the big Public Health Act in 1936. The normal method, associated with the name of Mr. Gladstone, is the segregation of the amendments into a separate Bill which, piloted on a parallel course, is eventually absorbed in the consolidating Act. We have seen this method working recently in consolidations of the law of companies, patents and registered designs.

It may be evidence of the confidence now justly reposed in the official draftsmen that a notable new device has lately been invented for cases where the amendments amount merely to minor corrections or the removal of unimportant anomalies. Proposals for these amendments can be notified and laid before Parliament with an explanatory memorandum. If the Lord Chancellor, the Speaker and the appropriate parliamentary committees are satisfied, and if neither House takes occasion to object, the amendments are adopted for incorporation in the consolidating Act. This new process was usefully applied during the recent rewriting of the law of marriage. The progress of consolidation, checked in 1898 (in spite of a protest from the veteran Lord Thring) because members of Parliament could not refrain from imposing their amendments on a consolidating Post Office Bill, now moves forward with fresh impetus. There is even a prospect of a codification of the law of income tax, if and when it is first consolidated.

Symonds, could he revisit us today, might pride himself that his *Mechanics of Law-Making* was not written in vain. We have not adopted his visionary scheme of ten committees of the House of Commons to revise all Bills before second reading. But we have a permanent office of parliamentary draftsmen, we have uniformity of method, we have marginal notes, numbered sections, schedules of specific repeals and a preliminary summary (in the case of lengthy Bills) of the contents of clauses. We have a well-tryed Interpretation Act, definition clauses and short titles, and an annual official index of the whole of the living provisions of the statute book. If we owe him any gratitude for these improvements, let us not forget to thank him also for one perfect answer he made before the Select Committee of 1836. He had been expounding a plan for a board to frame and revise laws; his board was to consist of practising lawyers and a draftsman. 'What', inquired the chairman, 'do you call a draftsman?' 'A person', replied Symonds, 'who can express himself so as to be understood'.

THE AIMS OF THE LAW OF TORT*

GLANVILLE WILLIAMS

AN intelligent approach to the study of law must take account of its purpose, and must be prepared to test the law critically in the light of its purpose. The question that I shall propound is the end or social function or *raison d'être* of the law of tort, and particularly of the action in tort for damages.¹

It is commonly said that the civil action for damages aims at compensation, as opposed to the criminal prosecution which aims at punishment. This, however, does not look below the surface of things. Granted that the immediate object of the tort action is to compensate the plaintiff at the expense of the tortfeasor, why do we wish to do this? Is it to restore the *status quo ante*?—but if so, why do we want to restore the *status quo ante*? And could not we restore this *status* in some other and better way, for instance by a system of national insurance? Or is it really that we want to deter people from committing torts? Or, again, is it that the payment of compensation is regarded as educational, or as a kind of expiation for a wrong?

An inquiry of this nature is familiar in criminal law. Every

* This lecture in the series of Current Legal Problems was also the Inaugural Lecture of the Quain Professor of Jurisprudence in the University of London. It is here printed in an expanded form.

¹ Three remedies may be mentioned as beyond my scope. (1) Actions for injunctions. Injunctions are backed by the threat of punitive or coercive imprisonment; the former is governed by the same considerations as criminal punishment, while the latter is to be justified by the same considerations as led the law-maker to include as part of the law of tort the rule that has been violated. (2) Actions for nominal damages to establish a right or to re-establish reputation. Here, the whole emphasis is upon the judicial determination of right or vindication of character. A criminal prosecution may be used for precisely the same purpose. (3) Actions founded on tort for multiple damages by way of penalty, *e.g.*, against a tenant at sufferance for double the yearly value of the land. Statutory provisions of this kind were formerly not uncommon (Pollock and Maitland, Vol. 2, p. 522); now, such actions are practically unknown.

Any legal proceeding may be used to settle the law in general or the rights and duties of the parties in particular; thus a tort action may be used to settle proprietary rights. I have not taken account of this function either.

lawyer knows the various theories of criminal punishment: propitiation of the victim, expiation, deterrence, incapacitation, reform. The question is whether any of these interpretations fits the sanction in tort, and if not whether there is some other that does so. In asking this question we must be prepared to find that there is no simple answer. No one theory adequately explains the whole of the criminal law, and it may be that the law of tort, also, refuses to open to a single key. Then again, we must bear in mind that any inquiry into the social justification of the law of tort is really three inquiries: a doctrinal inquiry, what purpose the law of tort has been commonly thought to serve, a sociological inquiry, what purpose it does in fact serve, and a philosophical inquiry, what purpose we ourselves think it ought to serve. It is possible for a rule to be designed to do one thing and in fact to do another, and we may think it ought to do something different from both. It is also possible for different rules of the law of tort to have different justifications. Thus there may be a difference between torts to the person and torts to property, or between intentional and negligent torts.

THE FOUR POSSIBLE BASES OF THE ACTION FOR DAMAGES IN TORT

There are four possible bases of the action for damages in tort: appeasement, justice, deterrence and compensation.

Appeasement.—Crime and tort have common historical roots. The object of early law is to prevent the disruption of society by disputes arising from the infliction of injury. Primitive law looks not so much to preventing crime in general as to preventing the continuance of this squabble in particular. The victim's vengeance is bought off by compensation, which gives him satisfaction in two ways: he is comforted to receive the money himself, and he is pleased that the aggressor is discomfited by being made to pay. By this means the victim is induced to 'let off steam' within the law rather than outside it.

In modern times the safety-valve function of the law of tort, probably takes a subordinate place. We do not reckon on the recrudescence of family feuds as a serious possibility, or even that of duelling.² However, it may be thought that unredressed torts

² For poor persons, especially, the existence of a right of action in tort has in the past been rather an academic affair, particularly where the tort-

would be a canker in society, and to that extent the law can still be regarded as having a pacificatory aim.

This aim can perhaps be detected especially in the torts of defamation, seduction and enticement. These are the only torts that do not survive the death of the victim or the tortfeasor under the Act of 1934.³ It is difficult to explain why they should not survive the death, unless perhaps on the hypothesis that the acts in question are rendered torts only to bribe the victim not to 'take the law into his own hands', and that the bribe becomes unnecessary when the victim⁴ or the tortfeasor dies. It may be doubted, however, whether the risk is nowadays an appreciable one. Dryden was set upon in Rose Lane by hirelings of the Duchess of Portsmouth, whom she had employed to avenge a slight, and such an incident was formerly not uncommon. But manners have changed; the Englishman, and the Englishwoman, have become phlegmatic, and the horse-whip is out of use. Also, the explanation implies that there is nothing socially harmful in defamation of character, except the risk that it may cause the person affronted to break the peace. This is obviously untrue. The explanation of the tort of defamation rings still more hollow when this tort is compared with the crime of libel. Libel as a crime does rest to an appreciable extent on the desirability of soothing the victim in order to prevent him from breaking the peace⁵; that is why it applies even where the only publication is to the victim himself, but is confined to serious

feasor also is poor. The poor man's redress, if any, has been in the magistrates' court, *e.g.*, in respect of assault. Defamation, which is traditionally a potent barrator, is outside the jurisdiction of the county court.

³ Law Reform (Miscellaneous Provisions) Act. The maxim *Actio personalis moritur cum persona* had two applications: (1) If A committed a tort against B, and A died, no action survived. This seems to have been due to the punitive nature of the early action of trespass: it would have been unjust to punish any one but A. (2) If B died, no action survived either. This is more difficult to explain. The rule was at first stated in cases of trespass; now trespass may have originated from appeals of felony, and 'perhaps the rule that an appeal ended, whether it was the appellor or the appellee who died, infected the law about trespass also' (Winfield in (1929) 29 *Columbia Law Review*, at p. 242).

There was a common-law exception to rule (1) where the tort had enriched the tortfeasor's estate (Holdsworth, *History of English Law*, Vol. 3, p. 579); this appears to have been an expression of the moral or compensatory theory of tort (below).

⁴ This, of course, assumes that the feud will not be taken up by the victim's family.

⁵ It originated in the Star Chamber, which wished to put down duelling: Holdsworth, *History of English Law*, Vol. 5, pp. 209-210; Vol. 8, p. 336.

libels. In contrast, the tort of defamation requires publication to a third party, *i.e.*, the possibility of damage,⁶ which makes no sense if its object is to prevent the victim from being stung to illegal action; also it applies to trivial defamation.

Liability for the tort of assault survives death, though this tort might have been regarded as one in which the pacificatory theory had some validity. As Bohlen has pointed out, the law of tort does not generally give damages for causing disagreeable emotions where no other loss is inflicted: exceptionally, it does so in the tort of assault,⁷ and it is significant that the grievance here is 'caused by acts which are of the sort which, unless satisfaction can be otherwise obtained, lead to reprisals and therefore are likely to provoke breaches of the king's peace'.⁸

Justice.—With the growth of moral ideas it came to be thought that the law of tort was the expression of a moral principle.⁹ One who by his fault has caused damage to another ought as a matter of justice to make compensation. Two variants of this theory may be perceived: (1) The first places emphasis upon the fact that the payment of compensation is an evil for the offender, and declares that justice requires that he should suffer this evil. This is the principal of ethical retribution,¹⁰ exemplified (in criminal law) by Kant's dictum about the moral necessity of executing even the last murderer. (2) The second

⁶ But it must be admitted that the law is hardly self-consistent, for once publication is proved the jury may award punitive damages, *i.e.*, damages unrelated to the compensation of the plaintiff.

⁷ Another exception in practice is seduction, though in that case there is supposed to be material loss in order to found the action.

⁸ (1926) 39 *Harvard Law Review*, at p. 320, note, reprinted in Bohlen's *Studies*, p. 630.

Perhaps another survival of older ideas in this respect is the general non-assignability of the tort remedy. On a deterrent or moral theory of tort there seems to be no reason why the victim of tort should not be able to sell his remedy to another, if he does not wish to be put to the trouble of pursuing it himself. Winfield, however, approves the rule, though he suggests an exception for torts to property (*Textbook of the Law of Tort*, 4th ed., pp. 652-654).

Punitive damages may be motivated in part by the pacificatory purpose. See Morris in (1931) 44 *Harvard Law Review*, at pp. 1198-1199.

⁹ For the change in law generally, see Pound, 'The End of Law as Developed in Legal Rules and Doctrines' (1914) 27 *Harvard Law Review*, p. 195.

¹⁰ Thus Kenny remarks: 'The sense of Ethical Retribution seems to play a part even in non-criminal law; for if, in some action of debt or trespass, the judge, in order to save himself trouble by shortening the suit, should offer to pay the plaintiff the damages out of his own pocket, an ordinary plaintiff would feel dissatisfied' (*Outlines of Criminal Law*, 15th ed., p. 37).

variant looks at the same situation from the point of view of the victim; it emphasises the fact that the payment of compensation is a benefit to the victim of the wrong, and declares that justice requires that he should receive this compensation. We may call this ethical compensation.¹¹

It may be thought that these two variants are simply two different ways of stating the same thing, but that is not entirely true. (1) Many people who would not subscribe generally to the principle of ethical retribution would nevertheless assert the principle of ethical compensation. The principle of ethical retribution goes much beyond anything needed to justify the law of tort, because it requires the wrongdoer to be punished generally. Making him pay compensation is only one form of punishment. It is quite possible to take the view that the wrongdoer ought to make amends without thinking that he ought to suffer in any other way. Again, (2) one who asserts the principle of ethical compensation does not necessarily say that the wrongdoer must himself be afflicted. If no one else will pay the compensation, the wrongdoer must; but if someone (such as the State or an insurance company) steps in and pays for him, the requirement of recuperation is satisfied even though there is no ethical retribution against the offender.

Those who adopt the doctrine of ethical retribution do not, and cannot, refer it to any other principle. It is a postulate—an ultimate value-judgment which can only be accepted or rejected.

¹¹ Thus in *Bessey v. Olliot* (1682) Raym. Sir T. 467, Raymond, J., said: 'In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering'—said in an action of trespass to the person, where, however, it has subsequently been settled that inevitable accident is a defence. Bohlen, while recognising the punitive origin of tort and the survival of this aspect in certain duties, declares that 'the modern tort recognising and enforcing social duties is in all its features purely compensatory': 'Contributory Negligence' (1908) 21 *Harvard Law Review*, at p. 256, reprinted in his *Studies*, p. 530. According to Buckland and McNair, *Roman Law and Common Law*, p. 267, the object of tort (punitive damages apart) is compensation, in contrast to the Roman delict, where the action was for a penalty. Kelsen, *Law and Peace*, pp. 8, 103, says: 'The civil sanction is distinguishable from the criminal sanction, and especially from the penalty involving property, not so much by outward circumstance as by its purpose; the purpose of the criminal sanction is prevention; of the civil sanction, reparation. But this contrast, too, is only relative. The social technique is fundamentally the same. . . . Civil execution, also, has a preventive effect, but it is not on account of this effect that it is provided'. These passages are quoted here though they may express a non-ethical theory of compensation (discussed later).

Those who reject it include the utilitarians, many Christians (I should like to call them the true Christians), the determinists, and the psychologists (who have a shrewd idea that our notion of vindictive justice has a very earthly origin).

The case is far different with ethical compensation. This does serve a social purpose, independently of any doctrine of punishment or (for the matter of that) of deterrence. Imagine a small community of comparatively moral people who hardly need a deterrent legal system but who do occasionally commit acts of negligence or even of unruly temper. Even such a community would find educational value in a rule requiring the making of reparation for harm caused by fault. Whereas people do not voluntarily accept punishment for themselves (except for religious reasons by way of penance), good people do accept for themselves the necessity of paying compensation for harm that they have caused. It is not a question of punishment, but of showing in a practical way one's solicitude and contrition, and of obeying the golden rule that we should do as we would be done by.

The existence within us of the sentiment of justice presupposed by this theory can easily be shown by an example. Suppose that you have borrowed a friend's book and lost it. As a conscientious person you will naturally wish to replace the book. It is not a question of intimidating yourself from losing books in future, but merely of doing the decent thing. (In fact, you will want to replace the book even though the loss occurred without your negligence, though the law says that you are liable only in the event of negligence.)

It is even held by some that the notion of rightness in this respect takes no account of the fact that money may have different values for the wrongdoer and the victim. In de Maupassant's story of the necklace, the poor Loisels replace for their rich friend her necklace that they have lost, though they have to drudge for ten years to make up the sum they think it is worth. Replacement is a point of honour with them, even though the burden of replacement is heavy beyond all comparison with the pleasure that it gives to the recipient.

Again, when a State commits an international delict, it will, if law-abiding, pay damages to the injured party. That it makes this payment is due to the sentiment of justice, and to the realisa-

tion that since the rules of international law serve a useful purpose, their violation must be followed by an effort to make amends. Payment of damages by a State can only to a small degree be put down to a deterrent theory, for no organised sanction exists to compel payment. No determined wrongdoer is going to be deterred by the possibility of being asked to pay damages when there is no means of enforcement.¹²

To pass from the law of tort for a moment, the ethical view of reparation is clearly seen in the attitude of the early Court of Chancery. Its theory was that the conscience of the wrongdoer must be purged by making restitution, which was exacted for the benefit of the wrongdoer's soul rather than of the victim's pocket.

This view of the law of tort, as formulated morality, has to face a difficulty. Assuming that the moral man will make amends for his wrongs, he will do so of his own free will. A moralist of Kant's way of thinking would say that there is no moral value in good conduct if you are put through the motions by somebody else. Hence, it is not enough to justify the law of tort to say that morality requires the wrongdoer to make compensation; we have to say that morality—or justice—requires the community to compel this readjustment. Aristotle would have asserted this, for he taught that justice required the restoration of equilibrium in society.¹³ Such also is the view of Thomist philosophy, which holds that the object of the State is to uphold natural law. In any case, to force an unwilling person to perform his moral duty may have an educational value, if not for him then for others. Also, in so far as power, status and respect are determined by the possession of money, the law of tort is, I suppose, a means of depressing anti-social elements and, by consequence, of exalting the good. ✓

Another possible objection that may be considered here is

¹² An international delinquency will give rise to a demand for compensation, and it may be better for the delinquent to comply with this demand than to face the repercussions caused by refusal. To this extent the demand is sanctioned, and may operate as a deterrent for the future. This seems to be the justification for Borchard's opinion that the inarticulate purpose of awarding damages for an international delinquency is that they are admonitory ((1927) 21 *American Journal of International Law*, p. 518; and see Brierly in (1928) 9 *British Year Book of International Law*, p. 45).

¹³ Gompertz, *Greek Thinkers* (Eng. trans. 1912), Vol. 4, p. 261, accepts Burnet's criticism of this view, that it fails to take account of the fact that the degree of injustice may either exceed or fall below the damage done.

that the law of tort does not perfectly reflect morality. Good motive is not necessarily a defence in tort, and bad motive does not necessarily make a tort. Even the fact that the defendant took reasonable care to avoid damage is not necessarily a defence. It must be admitted that this is, to say the least, a flaw in the ethical interpretation of tort, though perhaps a necessary one. We shall revert to it later.

Deterrence.—Ranged against the theory of tort as part of the moral order are those who believe that it is merely a regime of prevention. The action in tort is a 'judicial parable', designed to control the future conduct of the community in general. In England this view seems to have been first expounded by Bentham. Blackstone had expressed the opinion that civil injuries are 'immaterial to the public',¹⁴ but Bentham thought that such a contrast with criminal law could not be maintained, and that the underlying object of civil and criminal law was the same. Both criminal punishment and tort damages were sanctions and therefore evils: the only difference was in the degree of evil.¹⁵ The purpose of threatening them was to secure obedience to rules. Austin followed Bentham in this. The proximate end of the civil sanction, said Austin, is redress to the injured party; but its remote and paramount end is the same as that of the criminal sanction: the prevention of offences generally.¹⁶ Salmond adopted the same opinion. 'Pecuniary compensation', he wrote, 'is not in itself the ultimate object or a sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion'.¹⁷

The most vigorous exponent of the view in modern times is the Swedish jurist Lundstedt.¹⁸ According to him, the justification for the existence of civil law, like criminal law, is not

¹⁴ *Comm.*, iv, 5.

¹⁵ For references to Bentham see the discussion by Hall, 'Interrelations of Crime and Tort' (1943) 43 *Columbia Law Review*, at p. 757ff.

¹⁶ *Jurisprudence*, 5th ed., Vol. 1, p. 504.

¹⁷ *Torts*, 6th ed., p. 12, 10th ed., pp. 18-19; cf. the same writer's *Jurisprudence*, 7th ed., p. 134, 10th ed., p. 124. See, however, the comments of Stallybrass in his 18th ed. of the *Torts*, pp. 19-22. Another writer to adopt this deterrent theory of tort was Sidgwick (*Elements of Politics*, 4th ed., 1919, p. 114). Cf. Westermarck, *The Origin and Development of the Moral Ideas* (2nd ed., 1924), Vol. 1, p. 169. See also Cohen, 'On Absolutisms in Legal Thought' (1936) 84 *University of Pennsylvania Law Review*, p. 681, at pp. 686-687, for a denial of the clear dichotomy between crime and tort.

¹⁸ *Superstition or Rationality in Action for Peace?* p. 54ff.

morality but the fact that it is absolutely necessary for the existence of the community. Its object is to create a sense of safety and security, and this it does in two ways: first and foremost, by deterring from injurious and (from the point of view of the public benefit) useless acts, i.e., by preventing these acts through its psychological effect on the prospective wrongdoer; and, secondly, by promising the injured party that he shall or probably will receive damages in reparation if the legal prohibition is ignored. (Lawyers tend to focus their attention on the second—the reparative—aspect of the law of contract and tort; but in Lundstedt's view the more important social function is the first, the preventive.) 'One stares one's eyes out at the *relatively rare* cases where injury really has been done, but forgets the infinitely greater number of cases in which injury *has not been done* owing to the fact that a social order—including, among other things, criminal law and the law of torts—is operative'.¹⁹ Lundstedt points out that if, as is sometimes supposed, the community were naturally 'law-abiding' as a general rule independently of law, and the law of tort existed simply to impose liability for damage in the rare case where such damage was caused, it would be doubtful whether the usefulness of the law could counterbalance the disadvantage of the economic burden on the community involved in its maintenance. The truth is, he says, that 'law-abidingness' springs from the maintenance of law, and it is in the creation of this law-abidingness that civil law, like criminal law, finds its primary justification.

Lundstedt denies that there is necessarily a moral basis for the law of tort, even where liability is confined to cases of *culpa*. He seeks to prove his denial by an example., 'Through the negligence of a poor man a millionaire has suffered damage estimated at £500. Surely it would not be in accordance with the sentiment of justice that the poor man should eventually be forced to beg for his living in order that the millionaire might obtain his "satisfaction"?' In Lundstedt's opinion, not only is such a transfer unjust; it is, if regarded in isolation, socially undesirable. Only by taking a broad view can we discover it to be for the public good to maintain, without exception, a rule whereby damage ought regularly to be so transferred.²⁰

¹⁹ *Op. cit.*, p. 70.

²⁰ *Op. cit.*, pp. 71-72. The difficulty pointed out by Lundstedt is acute

Not every one will agree with this pronouncement on the question of justice. Poverty is a social evil, but the poor man is not (it may be thought) exempt from the moral obligation of endeavouring to make some reparation merely because he is poor. The extent of the redress that he may justly be called upon to make is a different matter; in legal terms it is a question of bankruptcy law. When the victim of the tort has obtained a judgment for damages, the tortfeasor can put an end to his liability by obtaining a discharge in bankruptcy.²¹

Whatever the imperfections of the moral interpretation of tort, the deterrent theory itself fails to provide a perfect rationale. For one thing, it offends against the principle that deterrent punishment must be kept to the effective minimum. According to utilitarian philosophy, of which the deterrent theory is an application, a punishment must not be greater than is necessary to repress the mischief in question. Damages in tort, however, may be far greater than are needful as a warning. If, in a moment of rage, I assault a film actor and unluckily spoil his looks, so that he is compelled thereafter to confine himself to broadcast drama, I am liable for damages based on his loss of earnings, which may be enormous; yet in a criminal court the same assault may be thought deserving only of a fine of £50. If a fine of £50 is sufficient to deter me and others from such assaults in future, the film actor's damages of, say, £50,000 cannot be justified from the point of view merely of deterrence. They can, however, be defended by reference to a principle of justice which says that since his loss of salary must be borne by him or me, in all the circumstances it is more just that I should

where, though the liability is technically based on fault, either the extent or the kind of the damage could not reasonably have been foreseen. In *Re Polemis*, for example, the Arab stevedore was theoretically liable to his last penny for the loss of the ship, though his negligence could be regarded as slight, and ethically as unrelated to the loss of the ship.

²¹ In considering possible amendments of the bankruptcy law it may be thought desirable to distinguish between intentional and unintentional torts. Every bankrupt is left with a basic minimum consisting of the tools of his trade, clothes and bedding for himself and his family to a value not exceeding £20 in the whole. The sum of £20 is now far too low and in practice is not strictly adhered to. It may be thought that, in any case, the minimum should be much higher for the merely negligent tortfeasor than for the intentional tortfeasor, and higher still for the defendant who is strictly liable without fault. It is of interest to note that in Hungary, in cases of strict liability, damages may be reduced according to the circumstances of the case (*e.g.*, the poverty of the defendant). See note 52, below.

bear it than he. This objection to the deterrent theory is not necessarily an out-and-out refutation of it, but at least shows that the theory, like the ethical one, does not explain the whole of the law. ~~X~~ h

Looked at as a deterrent system, tort can be regarded as lagging far behind the law of crime. In criminal law we have learnt the necessity of individualising punishment, and even, in many cases, of refraining from punishment altogether; but tort still imposes an arbitrary, mechanical forfeiture. Tort still seeks 'the object all sublime—to make the punishment fit the crime' (or rather, the fortuitous result of the crime), when the criminal law is giving up the effort to do so. In general, tort does not even care about the degree of the offender's fault. For instance, in criminal law the punishment for an intentional crime is generally more severe than for a negligent crime, because a more severe sanction is thought to be necessary by way of example; yet in tort the measure of damages is almost the same whether the tort was intentional or negligent. All the objections to the criminal fine—that it is ineffective or harmful as applied to poor persons, that by impoverishing it may drive to further offences, and that it falls upon the offender's family as much as or more than it falls upon himself ²²—apply with even greater force to tort damages, for (speaking generally) the amount of these damages is not under the control of the tribunal. Regarded merely as a deterrent system, the law of tort is nothing more than a crude rule of thumb, for the sanction will almost certainly be either too great or too little ²³ in any particular case. V

Damages are particularly ineffective against poor persons, and for wrongs of acquisitiveness. A thief or cheat could do good business if he merely had to restore his gains on the occasions when he was found out. For torts of damage or destruction, however, the deterrent effect of damages may be considerable. Again, the civil indemnity ²⁴ is generally limited to cases where damage has been caused: it is inapplicable, for

²² See, generally, Hentig, *Punishment* (Eng. trans.), p. 218ff.

²³ Hence the present-day justification for the rule that one must prosecute for a felony before suing—but it is doubtful whether this rule does not create more hardship than it is worth. Where the felon's resources are small and he is compelled to pay a fine and the costs of prosecution, the rule may have the effect of depriving the victim of his damages.

²⁴ Unlike the injunction.

instance, to careless driving where no one is injured.²⁵ On the other hand, the civil sanction is frequently more efficient than the criminal one in that there is a stronger inducement to sue than to prosecute.²⁶ It also has the advantage that it may be settled without action; every criminal charge must go through the court. In some instances the admonitory effect of a money judgment is increased by the award of punitive damages.²⁷ If we look from deterrence to prevention in general, it is arguable

²⁵ Also, to cases where the only damage is to society. For an interesting discussion of the question why the criminal is not made to pay damages to the State for the social harm he has caused see Hall, *op. cit.*, at pp. 920-921. For a suggested classification of some finable offences as 'public torts', see (1922) 35 *Harvard Law Review*, p. 463.

²⁶ For instance, the crime of obtaining property by false pretences is chronically under-enforced, owing to the reluctance of the police to prosecute and the preference of victims for the civil action. On the other hand, it is generally cheaper to prosecute than to sue.

²⁷ The three names of these damages—vindictive, punitive and exemplary damages—indicate that they can be supported by reference to each of the three non-compensatory theories of the law of tort; the satisfaction of vengeance, ethical retribution, and deterrence. The first two objects are probably dominant, but instances are not wanting in the reports of an avowed deterrent theory. 'If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences': *per* Holt, C.J., in *Ashby v. White* (1703) 2 Ld. Raym. 956. 'Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself': *per* Lord Mansfield, C.J., in *Wilkes v. Wood* (1764) 19 How.St.Tr. 1167, Lofft 19. 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?': *per* Gibbs, C.J., in *Merest v. Harvey* (1814) 5 Taunt. 443. Whatever the precise basis, punitive damages cannot be justified by a theory of ethical compensation, and, therefore, show that this theory does not explain the whole of the existing law. For a penetrating study of the relation of punitive damages to the function of the law of tort, see Clarence Morris, 'Punitive Damages in Tort Cases' (1931) 44 *Harvard Law Review*, p. 1173; and see Street, *Foundations of Legal Liability*, Vol. 1, p. 479. An objection to punitive damages is that they confer an unjust enrichment on the plaintiff; but this objection is not of great weight where the victim's injury is not capable of precise assessment in money: Demogue in (1918) 27 *Yale Law Journal*, at p. 592. Cf. H. E. Willis in (1909) 22 *Harvard Law Review*, p. 419. Judging by the falling off of reported cases on the subject, the practice of awarding punitive damages seems now to be practically discontinued, except in defamation, and even there the C.A. will exercise some control. See, as to the latter, *per* Hamilton, L.J., in *Greenlands Ltd. v. Wilmshurst* [1913] 3 K.B., at p. 532; *per* Maugham, L.J., in *Ley v. Hamilton* (1934) 151 L.T., at pp. 374-375. The effect of punitive damages may sometimes be achieved without avowing it, by generous assessment of the plaintiff's loss. See, e.g., *Armory v. Delamirie* (1721) 1 Str. 505, and the rule as to wrongful severance of chattels stated in Salmond, *Torts*, 10th ed., pp. 211-213.

that compensation payable to the injured party is educationally superior to a fine: it teaches a moral lesson.²⁸

To say that the goal of the law of tort is deterrence (if that is true) is not the same as saying that it actually does deter. No one that I know of has investigated by mass observation or psycho-analysis or statistics whether it fulfils this function. On the face of things, for instance, it seems unlikely that the tort of enticement is responsible for the comparatively small number of 'eternal triangles' in society; other causes could be named that are probably far more important. However, this absence of experimental proof has been almost as true for the criminal law as for the law of tort. The sanctions of the criminal law were imposed on the assumption that they would repress crime, long before scientific methods of sociological investigation were thought of. In the case of some of them there is grave doubt whether they do in fact deter, or whether a less severe punishment might not have the same salutary effect. This doubt does not detract from the fact that the aim of the criminal legislator, however clumsy the means he uses, is to prevent crime. Moreover, most lawyers would be ready to affirm (even though it is only a guess on their part) that both the law of crime and the law of tort do actually deter in a large number of cases. For instance, employers now take many precautions for the safety of their employees that they did not take before the Factory Acts and similar legislation created criminal and civil sanctions for lack of such precautions. It is true that the civil sanction can be insured against, but an employer with a high accident ratio is not likely to get favourable terms from his insurers. Again, it is probable that the publicity accorded to libel suits, and the high damages awarded, have had the result of making some people careful in making statements about others; in fact the cramping effect of the libel law upon freedom of discussion has been made, rightly or wrongly, the subject of complaint. There are probably many owners of dangerous structures who have spent money in putting them safe because of the fear of actions for damages, or

²⁸ For this reason Hentig, *Punishment* (Eng. trans.), p. 217, suggests that fines should go more frequently as compensation. English criminal courts have some limited powers of decreeing the payment of compensation; and in the U.S. it is the practice, in at least one type of case, to use conditional probation or the suspended sentence to induce restitution. See 'Restitution and the Criminal Law' (1939) 39 *Columbia Law Review*, p. 1185.

because it was only upon those terms that they could get insurance against liability. There are probably many business men who have been restrained from passing off their goods as other people's because of fear of the law of tort. The law is particularly effective when it can be expounded in advance in a solicitor's letter, the prospective victim having had notice of the other's intentions, or the tort being a continuing one.²⁹ Probably the law of tort is least successful in checking casual acts of inadvertent negligence.

✓ Realisation of the preventive role of tort has led to various proposals for the extension of the law. Thus, it has been suggested that there would be an increase of road safety if highway authorities were made liable for accidents resulting from their omission to repair highways.³⁰ Judges have created the tort of breach of statutory duty partly because they have thought the criminal sanction provided by the statute to be insufficient.³¹ When the question recently arose whether employers' liability in tort should be wholly replaced by State insurance, the argument was advanced that the common-law remedy tended to make employers more vigilant for the safety of their employees. The same idea is at the back of the legislative maxim that a mischief should not be made a crime if the civil sanction is sufficient.³²

²⁹ For these reasons, Dean Cecil Wright seems to go too far when he says that the law of tort 'is not regulatory of the conduct of the immediate actors', being 'concerned not with settling norms of human conduct, but with the adjustment of losses' ((1948) 26 *Canadian Bar Review*, p. 46). However, the statement has some truth when the law is uncertain or unknown.

It may be surmised that if the law of tort has not such a great deterrent effect as the criminal law, one reason may be lack of adequate publicity. People who have a working knowledge of the main prohibitions of the criminal law are surprisingly ignorant of the law of tort. They submit patiently to nuisances, stones in the cake they buy, mice in the hotel soup, even road 'accidents'. Perhaps the reason is the firm resolve of the ordinary man not to take the initiative in legal proceedings. He is not interested in the possible fruit when the risk and expense are so great.

³⁰ See *Report of Select Committee of the House of Lords on the Prevention of Road Accidents*, Cmd. H.L. 52 of 1939, para. 96; Rees Jeffreys, *The King's Highway*, p. 168.

³¹ See *per* Goddard, L.J., in *Hutchinson v. L.N.E.R. Co.* [1942] 1 K.B., at p. 489.

³² The classic statement is in Ihering, *Law as a Means to an End* (tr. Husik, Boston, 1913), p. 362ff.; cf. Sidgwick, *op. cit.*, p. 118. In England, the possession of land is protected largely through the civil law; peaceable dispossession of land is not a crime. So, also, with ordinary trespass upon land, slander, and the theft of use. It is evident that, in these instances, the law of tort is expected to have the deterrent effect

If the deterrent theory of tort is right, and even if deterrence is a mere by-product of compensation, the current definition of crime as a wrong resulting in punishment fails to define. Tort also, on this supposition, is a wrong resulting in punishment, for damages are punishment. A more careful definition of crime then becomes necessary if it is to be kept separate from the law of tort.³³

710 Compensation.—Finally there is the compensatory or reparative theory, according to which one who has caused injury to another must make good the damage whether he was at fault or not. This is the same as the theory of ethical compensation except that it does not require culpability on the part of the defendant. If valid, it justifies strict liability, which the theory of ethical compensation does not. The difficulty is, however, to state it in such a form as to make it acceptable. If it is said that a person who has been damaged by another ought to be compensated, we readily assent, moved as we are by sympathy for the victim's loss. But what has to be shown is not merely that the sufferer ought to be compensated, but that he ought to be compensated by the defendant. In the absence of any moral blame of the defendant, how is this demonstration possible?

It is fashionable to say that the question is simply one of who ought to bear the risk. This, however, is a restatement of the problem rather than a solution of it. A more satisfactory version

that would otherwise have to be produced by the criminal law. However, the tendency is for criminal law to creep up to the law of tort.

Incidentally, the proposition in the text shows that even the law of contract can be regarded as having a deterrent function—the function of inhibiting breaches of contract. In one respect it is more effective than the law of tort, for the plaintiff in contract obtains protection of his expectation interest, *i.e.*, is put into a beneficial position that he has not hitherto enjoyed, while the plaintiff in tort is merely restored to the position before the tort. In exceptional cases, where the civil sanction in contract is not enough, and there is a particular public interest in securing observance of the contract, a breach of contract may be made criminal.

³³ Winfield, *The Province of the Law of Tort*, p. 200, defines punishment as an 'evil which, when once liability to it has been decreed, is not avoidable by any act of the party offending'. This is intended to distinguish the liability to pay damages, but does not do so, for the liability to pay damages is not avoidable by any act of the party offending *without the plaintiff's consent*, and the liability to pay a fine (which is punishment) is avoidable by an act of the party offending *with the Crown's consent*. When it is added that the plaintiff is the immediate victim of the tort, and the Crown (as representing the State) is ~~of~~ the immediate victim of the crime, it will be seen that the suggested distinction becomes quite effaced.

is that known as the *entrepreneur* theory or, to speak English, the enterprise theory. This regards liability for torts connected with an enterprise as a normal business expense. Nothing can be undertaken without some risk of damage to others, and if the risk eventuates it must be shouldered by the undertaker in the same way as the cost of his raw materials.^{34/} That this attitude has come into prominence in the present century, though not unknown in the last, is symptomatic of the general search for security at the cost, if need be, of freedom of enterprise. It would not have appealed to philosophers of the individualist school of the last century. Sidgwick, for example, wrote: 'It is fundamentally important for the general happiness of any society that its members should be acting strenuously and energetically in some way or other; and it would too seriously interfere with this to lay down the broad rule "that every man acts at his peril", and is responsible for any mischief that may result'.³⁵ From this it looks as though the cry 'no liability without fault' comes from those who wish to maximise the national income, while the present apotheosis of strict liability is the result of a majority preference for security and broad equality, even if this means some stifling of progress. However, the actual rules of strict liability are so haphazard that they can hardly be fitted into any rational pattern. If the enterprise theory were consistently applied it would result in strict liability in respect of all acts done in the course of manufacture or business; but, in fact, the law does not go so far as this.

Whichever theory we think ought to be adopted as the basis of the law of tort, it is profitable to ask which one best fits the existing rules. It may be that the law of tort has grown without conscious purpose, or with a jumble of purposes; yet the law as it stands may be found to express one philosophy better than another.

^{34/} Thus, Lord Blanesburgh remarked in an action for nuisance that loss caused to the plaintiff by the defendant corporation 'is truly just as much part of the cost of generating their electrical energy as is, for example, the cost of the coal whose combustion is the original source of all the mischief': *Manchester Corp'n. v. Farnworth* [1930] A.C., at pp. 203-204.

³⁵ *Elements of Politics* (4th ed. 1919), pp. 114-115. The first edition was published in 1891. See to the same effect, Bishop, *Non-Contract Law* (1889), s. 11. Pound, *Introduction to the Philosophy of Law*, p. 189, states that the policy of the law is to enable men to rely on reasonable expectations concerning the conduct of others. This is a somewhat vague formula, and it is not clear how it fits in with strict liability.

There are certain rules of law that seem at first sight to be inconsistent with the deterrent theory of tort, but upon examination do not do so. I shall first consider these rules, and shall then turn to rules that do appear to disprove the deterrent theory, at least to some extent.

RULES NOT INCONSISTENT WITH THE DETERRENT THEORY

Even if crime and tort have the underlying unity of serving to discourage mischief, there is the important difference that whereas the tort sanction enriches the plaintiff the criminal sanction does not enrich a private prosecutor. This fact has several consequences.

(1) Contributory negligence on the part of the plaintiff was at common law a complete defence in tort (apart from the last-opportunity rule), and now operates to reduce the plaintiff's damages³⁶; but it is no defence in crime. This distinction may appear to show that whereas crime is a deterrent system, tort thinks only of compensation and of the amount that the plaintiff justly deserves. There is, however, an alternative explanation. The principles of the law of tort must be considered in relation to the plaintiff as well as to the defendant, whereas the criminal law is considered only in relation to the particular defendant. If a private prosecutor has done wrong, that may be made the foundation of a charge against him, but is irrelevant to his charge against the defendant; the wrong of a plaintiff in tort is not irrelevant because he is to receive the damages.

(2) Usually, it is no defence for a defendant in tort to assert that the plaintiff was himself a wrongdoer, for one must not harm even wrongdoers,³⁷ except for the limited reasons allowed by law. There is, however, an exception if the plaintiff has been induced by fraud to enter into a contract that is against public policy. If the plaintiff knew that the contract was against public policy, or if he knew the facts that made it so regarded as a

³⁶ It may be noticed that the Contributory Negligence Act, by its wording, supposes that the apportionment of damages is made on the basis of justice rather than on the necessity for deterring. It is assumed to be a principle of justice that damage should in general be proportionate to fault. This, however, is also the result of the deterrence doctrine. The wording of the Act can hardly be conclusive upon a question of ultimate ends.

³⁷ The authorities are collected in Williams, *Joint Torts and Contributory Negligence*, § 81.

matter of law, he cannot sue for damages in respect of a false representation on some collateral matter, even though the false representation has caused him to part with money.³⁸ This is because the policy of the law is to leave both parties to the contract without remedy. On the other hand, the victim of the deceit can perhaps prosecute the cheat for obtaining money by false pretences.³⁹ Again the difference, if it exists, may be explained by saying that the criminal remedy does not enrich the victim.

(3) Consent is no defence in crime where public policy precludes it, *e.g.*, in prize fights. The law of tort, however, has to remember the conduct of the plaintiff as well as that of the defendant. The law would stultify itself if it allowed the pugilists to bring cross actions, and the only course is to leave them both without remedy.

(4) In the crime of manslaughter, the accused is responsible for negligence only if it is 'gross', 'wicked', 'deserving of punishment'. In tort, the defendant is responsible for a death caused by ordinary negligence, and there is even authority for saying that the standard of care in tort is not merely an average but an ideal one. At first sight this difference may seem to suggest that the aim of the law of tort is not punishment; but on reflection this conclusion may be rejected. Where manslaughter is punished by imprisonment, this punishment, taken by itself, involves a net loss of happiness to the community; the imprisonment does not directly or intrinsically make any one better off.⁴⁰ On the other hand, the sanction in tort enriches the plaintiff to the same extent that it impoverishes the defendant, if costs are left out of account. It would be a false philosophy to equate the transfer of money with a transfer of happiness; but that there is, for many people, some connection between the two can hardly be denied. The money that the plaintiff gets by way of damages may bring him more happiness than it would

³⁸ *Parkinson v. College of Ambulance* [1925] 2 K.B. 1.

³⁹ So held in *Commonwealth v. O'Brien* (1898) 172 Mass. 248, 52 N.E. 77, dissenting from two earlier cases. Holmes, J., said: 'The criminal law has a public end in view, namely, to deter people from swindling. . . . We think . . . the question of allowing . . . a personal remedy is essentially different'. Cf. *People v. Majorana* (1913) 155 App.Div. 431, 140 N.Y.Supp. 8, where the point passed *sub silentio*.

⁴⁰ Apart possibly from the gratification of a desire for revenge on the part of the relatives; but it may be thought that this is not a feeling to be encouraged.

have brought the defendant, or it may bring him less; but for legal purposes, since we must have a rule, we assume that these differences average out and that every shilling represents a fixed quantum of human happiness. On this view, redress in tort does not diminish the total of happiness in society. It is therefore reasonable to use the tort sanction with greater liberality than the sanction of imprisonment. This partly explains why the crime of manslaughter is defined more narrowly than the corresponding tort of negligence.

Against this explanation it may be urged that manslaughter is punishable by fine instead of imprisonment if the judge thinks fit, and a fine has the same characteristic as damages: it is a transfer of a good rather than a destruction of a good. The difficulty is a real one, but it may perhaps be met by pointing to a second characteristic of the criminal sanction as opposed to the tort one. The criminal sanction has an emotive aura that is largely lacking in the civil remedy.⁴¹ To stigmatise the ordinary person by the epithets 'criminal', 'offender', and 'conviction', is itself a punishment, and, from a deterrent point of view, it is important that the emotion invoked by these words should be kept at full strength and not weakened by their indiscriminate application.⁴² Even the punishment of fine, therefore, should be applied more sparingly than the remedy of damages.

(5) The rule of strict construction of penal statutes applies not only to crime but to all statutes appointing punishments, e.g., statutes providing for a penalty to be payable to the injured party. It does not, however, apply to statutes affecting the law of tort. Then again, it is generally thought to be improper for the judges to create a new crime by retroactive 'judicial legislation', but there is not the same objection to the judicial creation of new torts. These differences may be explained in the same way as before: the tort sanction is a transfer rather than a diminution of economic goods, and its operation does not affect emotional attitudes to the extent that the criminal law does.

(6) There is a difference as to burden of proof. In criminal law, which aims at punishment, the case must be brought home

⁴¹ But there is disgrace in a bankruptcy following upon an adverse judgment in tort, and conversely little disgrace in a conviction for speeding.

⁴² Yet, from the point of view of reformation, the feeling of guilt induced by the operation of the criminal law may in some cases be a positive hindrance.

beyond reasonable doubt. In tort, it is enough to tip the balance of probability.⁴³ This may seem at first to indicate that the office of the law of tort is not punishment but the shifting of loss to the person who is most likely to be responsible for it. Against this it may be said that the tort remedy can, even on a deterrent theory, be awarded more liberally than criminal punishment, for the two reasons given under the previous headings.

(7) The criminal law surrounds the culprit with many other procedural safeguards, *e.g.*, the privilege against self-incrimination, which have no application to civil actions. These differences may again be justified on emotive grounds.

We may add :

(8) In one case the deterrent hypothesis fits much better than the compensatory one. By the Act of 1934, personal representatives can recover damages in respect of a tort done to the deceased before his death, even though the deceased has by will left all his estate to charity. It is hard to explain this as resting on anything other than deterrence or (possibly) ethical retribution.

(9) Spouses cannot generally prosecute each other for larceny, theoretically because of the unity of possession, actually because such proceedings do not conduce to good relations. On the other hand, the criminal law protects the spouses against each other in respect of assaults. When we turn to the law of tort the position is almost the opposite; spouses cannot sue each other for torts to the person, but a wife can sue her husband for torts to property (though a husband cannot sue his wife even under this heading). It can hardly be said that either the criminal law or the law of tort works very well on these matters; the rules are in part explicable only historically, and it does not seem that they throw light on the final cause of the law of tort.

RULES INCONSISTENT WITH THE DETERRENT THEORY

Other rules of tort seem to defy reconciliation with the deterrent theory, or even sometimes with the moral theory.

(1) How far does the existence in the law of tort of strict liability prove one hypothesis or the other? Strict liability is difficult to harmonise with the moral theory, even though in some circumstances a man might feel himself under a moral obliga-

⁴³ See, *e.g.*, *Dollman v. Hillman Ltd.* [1941] 1 All E.R., at p. 358.

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tion to make reparation for harm that was not his fault. It is equally hard to reconcile with the deterrent theory. Thus Austin, who assumed that damages were a sanction, assumed also that no one could be liable for a wrong (whether criminal or civil) without fault; there could be no liability as for a wrong in respect of accidental mischief.⁴⁴ Salmond, who followed Austin's philosophy, was forced to recognise the existence in law of strict liability, but disapproved it. 'No one', he wrote, 'can be deterred by a threat of punishment from doing harm which he did not intend and which he did his best to avoid. . . . There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any *mens rea* on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether'.⁴⁵

Against this, Lundstedt argues that strict liability is justified by the difficulty of proving fault. Although the purpose of the law of tort is primarily to stimulate people to act with proper care, there are cases where a really competent investigation into the question of lack of care cannot as a rule be made. If negligence were here required to be established, the consequence would be that, in most cases of actual negligence, the defendant would be excused from damages. 'Such a rule would not be effective as a preventive against careless action, nor could it create a sufficient sense of security in the community'.⁴⁶ In such cases there is a justification for imposing liability without fault.

The trouble with this view is that it is not a complete explanation, for difficulty of proving negligence should merely result in a rule shifting the burden of proof, not in a rule creating strict liability. Other reasons for strict liability not involving the theory of deterrence have been advanced: for instance, it has been suggested that a business enterprise should regard strict liability as part of its operating costs. This is the non-ethical reparative theory already mentioned.

Another thorny problem is presented by vicarious liability in tort. Strict liability, which is met with only in certain situations,

⁴⁴ *Jurisprudence*, 5th ed., p. 468ff., esp. at p. 478 (Lecture 25).

⁴⁵ *Torts*, 6th ed., pp. 12-13; 10th ed., pp. 18-19.

⁴⁶ Lundstedt, *op. cit.*, p. 63.

can perhaps be explained as resting upon special difficulties of proof, or the need in some particularly dangerous circumstances of requiring an especially high standard of care; but this reasoning can hardly apply to vicarious liability, which is of general and not merely limited application.⁴⁷ All efforts to find a satisfactory reason for vicarious liability have failed⁴⁸; yet, mysteriously, the principle retains its hold upon our affections. It can be explained in terms of the non-ethical reparative theory: that when one has been injured, search should be made for the nearest financially-responsible person involved in the chain of causation (however protracted), and the loss should be cast upon him. Yet, brought out into the light of day, such a purely recuperatory theory would probably be rejected by moralists. Another favoured explanation is the enterprise or overhead-charge theory⁴⁹; but as already said, this is not consistently applied in the law; and its effect would perhaps be too repressive of initiative if it were.

Even liability for personal negligence occasions difficulty in applying ethical and deterrent theories. Although legal fault comprises wrongful intention and negligence, it seems at least doubtful whether inadvertent negligence should be classed as moral fault. Inadvertent negligence consists in failure to per-

⁴⁷ That vicarious liability is inconsistent with a punitive theory of tort can be shown from history. In the Middle Ages the action of trespass was partly punitive; the unsuccessful defendant was condemned to pay a fine as well as damages and he might even be adjudged to prison; process could also lead to outlawry. Consequently the action was held not to lie against the master, for the master was not to be 'punished' for his servant's trespass (Pollock and Maitland, Vol. 2, p. 531; for similar language see the sources quoted in Williams, *Liability for Animals*, pp. 189, 191). The development of vicarious liability became possible only when the compensatory aspect of tort came to the fore and the punitive aspect receded.

Until the present century the courts set their faces against vicarious liability in criminal law; see, e.g., *Lee v. Dangar, Grant & Co.* [1892] 2 Q.B. 337, at p. 348; *Bagge v. Whitehead* [1892] 2 Q.B. 355. Since *Coppen v. Moore* [1898] 2 Q.B. 306, a change has occurred which has thrown the theory of criminal law into some confusion.

⁴⁸ See Baty, *Vicarious Liability*; Holmes, 'Agency' (1891) 4 *Harvard Law Review*, 345, p. 5; 5 *ibid.*, p. 1.

⁴⁹ Laski in (1916) 26 *Yale Law Journal*, p. 105; Smith in (1923) 23 *Columbia Law Review*, pp. 444, 716; Douglas in (1929) 38 *Yale Law Journal*, pp. 584, 720; Wurzel in *The Science of Legal Method*, pp. 409-411. Denning, L.J., said: 'Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom the risk should fall. Notable examples occur in the liability of a master for or to his servant, and in the escape of dangerous things': *White v. White* [1950] P. at p. 59.

ceive the likelihood of harm as resulting from your conduct, and it may be regarded as incompetence rather than fault. If so, liability for inadvertent negligence cannot be predicated upon morality.

The lawyer distinguishes between incompetence and fault. It is not negligent for a labourer to fail to possess the skill of a bricklayer; that is merely his misfortune. However, if the labourer without adequate reason and without giving proper notice of his deficiencies undertakes to build a wall, when he is not competent to do so, we hold him guilty of negligence in respect of any damage that results. Why is his inability to build a wall merely incompetence, when his inability to perceive his own limitations—his excessive self-confidence or optimism—is negligence and moral fault? The truth is that both are constitutional or educational defects. This holds also for other causes of inadvertent negligence, such as elephantine clumsiness, lack of observation, inability to make deductions, lack of imagination, and slow 'reaction time'. The individual may possess the power to remedy these defects in greater or less degree by effort; but on the other hand he may not.

Lawyers were once accustomed to debate whether the standard of care in negligence was subjective or objective, and the issue was eventually settled in favour of the objective standard of the reasonable man. Such a standard cannot be justified as an expression of moral principle, but it is sometimes supposed that a subjective standard is conceivable that would be a moral one. This is not so, for in truth there is no such thing as a wholly subjective standard. A standard may be more or less subjective, in the sense that it may take account of more or less of the particular factors affecting the individual; but once bring into the standard all the factors affecting the individual and the standard disappears; you have simply the statement of fact that 'he did it'. It cannot even be asserted that the individual failed to live up to the best standard that he was capable of, judging that capability by his conduct on some other occasion; for this is merely taking the objective standard of his conduct on that other occasion.⁵⁰

⁵⁰ Such a standard is also most difficult and cumbrous in application, for it lets in evidence of the whole course of life of the accused. Cf. *per* Lord Watson in *Knox v. Mackinnon* (1888) 13 App.Cas., at pp. 766-767.

This point of view may become clearer if we consider a person of intelligence below the average. Take a person whose intelligence quotient we fix at 80, the average being 100. He inadvertently causes damage, and we have to decide whether his act is negligent. In law this question is determined by reference to the standard of the reasonable man. There may be practical justification for this test, but it cannot be a moral criterion. Morally we must judge the man according to a standard (if such be conceivable) appropriate to persons of an I.Q. of 80. Let it be granted that a person of I.Q. 80 would probably have foreseen the damage. It is obvious that this statement of probability cannot yield a logical conclusion that such a person ought to foresee such damage. The chasm between a proposition of fact and an 'ought' statement is logically unbridgeable. Moreover, the statement of probability is valid only if we are allowed to select artificially the facts on which it is based. A more refined inquiry might, and indeed would, show that facts of the particular subclass to which the event in question belongs would probably *not* have been foreseen. There must have been some facts operating to prevent the particular event from being foreseen by the particular individual, because in fact it was not foreseen. A more detailed inquiry would in theory reveal these facts. From all this it seems clear that no attempt to classify persons by intelligence quotient can yield an ethical norm. To put the matter in a nutshell, an objective standard of care is not an ethical one, and a subjective standard is a contradiction in terms.

If negligence is not a form of fault, we get the result, paradoxical to the lawyer, that liability for negligence is a form of strict liability.⁵¹

All this is simply part of the general argument for the determinist view. If inadvertent negligence is not a form of moral fault, advertent negligence and intentional wrongdoing are not either, for in each case a person simply behaves as he is made or conditioned to behave. Thus liability for intentional wrongdoing also becomes strict liability!

Whether these arguments are valid or not, there are certain practical considerations that tell the other way. Sensitive and

⁵¹ Cf. Hall, *op. cit.*, 43 *Columbia Law Review*, at p. 979ff.

socially-minded people do feel remorse or self-blame for both intentional and inadvertent conduct resulting in damage. This feeling is socially important, because it enables human beings to improve their conduct for the future. It is desirable that the feeling should be reinforced by law and language. Liability in tort for negligence tends to have an educational effect, whereas strict liability in tort may operate where education is hopeless. Consequently, we may admit the one kind of liability more widely than we admit the other.

A somewhat similar mode of reasoning may square liability for inadvertent negligence with the deterrent theory. On the face of things, the two are incompatible, for if a man does not realise the risk of causing harm, threat of punishment for causing such harm can have no deterrent effect. This proposition, although it states an important truth, oversimplifies the issue. (a) Conduct may consist of inadvertent negligence in one respect combined with advertent negligence (or wilful wrongdoing) in another respect. Thus, a railway signalman may be guilty of inadvertent negligence in failing to make a signal owing to intoxication, but of previous advertent negligence in getting drunk knowing that he was about to go on duty. In many cases, however, where the immediate cause of the damage is an act of inadvertent negligence, the search for some previous act of advertent negligence fails. The ordinary person does not inflict harm on other people with conscious recklessness; he believes himself to be competent in what he does. Most cases of negligence, therefore, are cases of pure inadvertence. (b) What has just been said must be qualified by the remark that the position is complicated by subconscious desire. An act that on the face of it, and even to the subject himself, is one of inadvertent negligence may be subconsciously willed. Again, there is something that tends to make us remember the things we want to remember and to forget the things we want to forget. The threat of punishment may aid the memory. (c) The distinction between advertent and inadvertent negligence is not sharp but is one of degree. It depends upon foresight of the probability of damage, and probability is a matter of degree. Moreover, foresight is a matter peculiarly difficult to establish by evidence. This may be a practical reason for refusing to discriminate between the two in the law of tort. Finally, (d), the application of a sanction for

inadvertent negligence is a warning to this particular defendant which may improve his conduct in future.

The chief trouble about the concept of responsibility and the theory of deterrence is the case of the lunatic or other person so much below average mentality that we feel it to be unjust or futile to judge him by normal standards. The lawyer's view is that the difficulty in drawing the line, and in formulating sub-normal standards, is not sufficient reason for abandoning the concept of responsibility or the object of deterrence for the great majority of ordinary people. In criminal law we attempt to maintain special rules for those of unsound mind. In tort, however, this is apparently not done. Although there is little authority, persons of unsound mind are said to be responsible in tort to the same extent as if they were sane.⁵² This is difficult to reconcile with either an ethical or a deterrent hypothesis. The difficulty is accentuated by the fact already mentioned, that the criminal law, which generally is regarded as resting on either a moral or a minatory basis, makes special provision for persons of unsound mind. If criminal law does this, why should not tort

⁵² See the judgment of Denning, L.J., in *White v. White* [1950] P., at pp. 58-59, commented upon in (1950) 66 *Law Quarterly Review*, p. 12. The case decided that acts could amount to cruelty for the purpose of divorce though resulting from insanity. It overruled *Hall v. Hall* (1864) 3 Sw. & Tr. 347, where the Judge Ordinary said: 'Though the object of this court's interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain'.

The authorities referred to by Denning, L.J., are not strong, and a contrary view of the law is taken in Halsbury (2nd ed.), Vol. 21, p. 288. See also Ames, 'Law and Morals' (1908) 22 *Harvard Law Review*, p. 99, reprinted in his *Lectures on Legal History*, p. 437, and in *Selected Essays on the Law of Torts*, p. 3: 'There are several English dicta against the lunatic, and an unreasoning respect for these dicta has led to several regrettable decisions in this country and in the British Colonies. These decisions must be regarded as survivals of the ancient rule, that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that the lunatic, not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault'.

A possible solution would be that adopted in Hungary, where the courts have established a doctrine of equitable liability under which they may impose such measure of liability without fault as the circumstances (including the financial position of the parties) render just. Thus a rich lunatic may be ordered to pay compensation, while a poor one is not. For this information I am indebted to Mr. Charles Szladits, now of Columbia University.

do likewise? There can be no justice or preventive effect in punishing a man for failing to come up to a standard that he is mentally incapable of attaining, even under the stimulus of the threat of punishment.

It may be submitted that the practical view is that a person of inferior intelligence should be judged on the basis of educability. If he is not educable, it is mere cruelty to condemn him in damages for his torts; but we should be slow to arrive at the conclusion that he is not educable.

✓(2) If the paramount end of tort is to prevent a repetition of the wrong, why is the State so disinterested in the question whether the sanction is enforced? The police will hardly lift a finger to help one to bring an action in tort.⁵³ Indeed, they have little power to do so. Whereas there are wide powers of arrest for crime, and a perfectly general power of arrest for crime with a justice's warrant, there is no power of arrest to bring an offender to book for a tort: not even to get his name and address. Another contrast: no private person can effectively agree to stifle a prosecution; but an agreement to give up an action in tort is valid and binding, even though the agreement only gives the plaintiff a fraction of his proper damages. Says Bacon's *Abridgment*: 'Causes criminal are not arbitrable, because they ought to be punished for the common good'⁵⁴; yet tort is arbitrable.

It is even possible to contract out of tortious liability in advance. Thus, suppose that a shipping company inserts in its tickets a condition against liability for negligence; owing to the negligence of the company a passenger is killed in a collision: the company is not liable in tort, being protected by the condition,⁵⁵ but it can still be guilty of the crime of manslaughter.⁵⁶

✓ If tort has a deterrent function, a clause exempting from liability for negligence should be void as against public policy. This is not the law, and there is a general tendency to regard liability in negligence as a mere question of commercial risk. When the shipping company contracts out of liability it is able to quote a

⁵³ Except that they will, upon payment, supply a copy of a police report of an accident.

⁵⁴ *Bac. Ab. Arb. A.*; *Baker v. Townshend* (1817) 7 Taunt. 422; Russell, *Arbitration*, 14th ed., pp. 5-6.

⁵⁵ *Haigh v. R.M.S.P. Co.* (1883) 52 L.J.Q.B. 640.

⁵⁶ This assumes that the company is unincorporated or that the opinion in *R. v. I.C.R. Haulage Ltd.* [1944] K.B., at p. 556, is followed.

lower fare; and a passenger may (it is said) prefer the lower fare to the possible right of action. This line of argument ignores the deterrent effect of tort liability altogether.⁵⁷

These rules certainly make it seem as though the civil law looks only to compensation. Yet certain counter-tendencies are apparent. The judges do not in fact regard exceptions clauses as merely affecting the commercial incidence of risk, for although these clauses are theoretically valid, they are construed as narrowly as possible.⁵⁸ I am not sure that if a judge were questioned on the matter he would say that his dislike of exceptions clauses is because they lessen the preventive effect of the law of tort; it is more likely that he would merely express the view that an exceptions clause is unjust or unfair. However this may be, a clear recognition of the public policy of the matter is to be found in the Road Traffic Act, 1930, s. 97, which renders void any contract exempting a bus company from liability for negligence. The section was presumably inserted because of the mortality on the roads and the consequent desirability of maintaining every incentive to careful conduct. There is a similar provision for carriage by air.⁵⁹ It is hard to see why exactly the same policy should not apply to shipping and railway companies or authorities, in respect of injuries to passengers, and, indeed, to every situation involving personal safety. There is all the difference between loss of replaceable property, where the main factors entering into the calculation are economic, and injury to the person, which may well be irremediable, and in any case involves a non-economic element of human suffering. In the one case, a contract excluding liability for negligence is permissible, and there is no reason why it should be interpreted

⁵⁷ Thus Dean Goodrich, discussing the case of the pebble in a loaf of bread, said: 'Possibly we can find out whether, if liability for the customer's broken tooth is placed upon the baker, the price of bread will be increased. Even if we learn that fact, we still have the problem whether it is better social policy that all bread buyers should pay a little more in order that an individual buyer should have his dentist bill paid by the baker, or whether it is better to leave the victim to meet his loss as best he can to keep down the price of bread for the rest of us': in *The Future of the Common Law* (Cambridge, Mass., 1937), p. 163. Cf. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review*, at p. 467.

⁵⁸ See, e.g., *John Lee & Son (Grantham) Ltd. v. Railway Executive* [1949] 2 All E.R. 581, and the valuable note thereon by Dr. Kahn Freund in (1950) 13 *Modern Law Review*, p. 100.

⁵⁹ Carriage by Air Act, 1932, Sch. 1, Art. 23, applying only to the liability fixed by the Convention of Warsaw.

more restrictively than any other contract; in the other case, it should be regarded as wholly void on account of public policy. ✓

(3) Arising out of the last discussion, if tort reposes upon the need to deter evil-doers, why is the State generally indifferent to the fact that the sanction is so often avoided by insurance? ✓ When the tortfeasor carries liability insurance, and knows that damages awarded against him will be paid by the insurance company, the sanction of the law of tort seems to lose its preventive effect; yet the contract of insurance is not generally regarded by the courts as void on account of public policy. This seems to be inconsistent not only with the deterrent hypothesis but with the theory of tort as a system of ethical retribution: if it is right that the tortfeasor, personally, should be punished by being made to pay, it cannot be right that he should be able to deflect his punishment to another. There is only one theory of tort with which the practice of insurance is consistent, and that is the compensation theory, whether of the ethical or the non-ethical varieties.

It seems, then, that in deciding whether or not to uphold this insurance, the judge is really deciding between conflicting purposes of the law of tort. The deterrent aim would dictate a rule against the ability to insure, for insurance impairs the deterrent effect of the sanction; and the retributive aim would have the same result. On the other hand, the reparative aim would allow insurance, because the defendant may be a man of straw from whom the plaintiff cannot otherwise get his damages. To give the reparative aim predominance in this particular context is not, it may be said, to abandon deterrence utterly. For insurance companies have their own methods of discouraging the expensive client, as by the no-claim bonus and the raising of premiums for a careless assured. A very careless person may eventually fail to get insurance cover altogether. There is also the fact that an action for negligence is brought against the assured in his own name, so that even if it costs him nothing he is put to trouble and gets unwelcome publicity.⁶⁰

These are reasons for allowing insurance; whether they are present to the minds of judges who decide the cases I am not aware. It is still not finally settled how far liability insurance

⁶⁰ But in the case of motor insurance, companies have a 'knock for knock' agreement which has the result of putting an end to litigation altogether.

is valid. One rule is clear: a person cannot insure against having to pay damages for the commission of an intentional tort that is also a crime, like the tort of murder (if the expression may be permitted); such a contract is against public policy.⁶¹ Probably, the law is the same for intentional torts that are not crimes. Here deterrence comes to the fore. On the other hand, generally speaking, one can insure against liability for unintentional torts that are not crimes, *e.g.*, the master's insurance against vicarious liability. Here the emphasis is upon reparation, and deterrence takes a secondary place.

On the authorities, it is not conclusively determined whether one can validly insure against liability for an unintentional tort that is also a crime. In two cases it was held by puisne judges, I think rightly, that a policy of automobile insurance against third-party claims is good even though the particular third-party claim is made in respect of driving that is so negligent as to be not only a tort but the crime of manslaughter.⁶² Two members of the Court of Appeal have reserved their opinion as to the correctness of these decisions,⁶³ but surely the doubt is unfounded. The contrary view would knock the bottom out of the system of compulsory third-party insurance for the drivers of motor vehicles.⁶⁴ It would mean that the greater the negligence of the motorist, the less likely he would be to be effectively insured.

⁶¹ Cf. *Haseldine v. Hosken* [1933] 1 K.B. 822 (maintenance).

Exceptionally it might be held, by implication from the Road Traffic Act, that insurance against even intentional torts committed with an automobile is valid, *e.g.*, where a lorry driver in a fit of temper deliberately drives into a small car. But it may be replied (1) that the Act does not express an intention to create this change; (2) if the change is effected, it must benefit not only the injured person where the assured is insolvent, but also the assured himself where he is solvent, which is strange if the tort is intentional—query whether the assured can recover even as a matter of construction of the policy; (3) in the example put, the suggestion is unnecessary, for action can be brought against the employers of the lorry driver, and so far as they are concerned the tort is not an intentional one.

⁶² *Tinline v. White Cross Insurance Association* [1921] 3 K.B. 327; *James v. British General Insurance Co.* [1927] 2 K.B. 311.

⁶³ *Haseldine v. Hosken* [1933] 1 K.B. 822. See Williams, *Joint Torts and Contributory Negligence*, § 41, and cf. *Leggate v. Brown* [1950] 2 All E.R. 564.

⁶⁴ Presumably, if the damages were not legally payable by the insurance company, they would now be paid by the Motor Insurers' Bureau, a voluntary body set up by agreement with the Government to make good deficiencies in insurance policies for the benefit of injured third parties. But this practice can hardly affect the construction of the law as it stood immediately after the passing of the Road Traffic Act in 1930.

It has been suggested by some, as a compromise solution, that a policy against tortious liability for 'motor manslaughter' should be void, except in favour of third parties to the extent that they fail to recover owing to the insolvency of the assured⁶⁵; but such a *tertium quid* can be achieved only by Parliament, for legal logic permits only of the policy being completely void or completely valid. In any case it may be doubted whether the suggestion is to be commended. The suggestion is based upon a purely deterrent approach to the law of tort, and what it means in reality is the creation of a minimum penalty for manslaughter, outside the control of the trial court and defined by reference to circumstances of which the driver may have had no knowledge at the time of his act. If the suggestion is adopted, the motorist who causes a film actor to die a lingering death may pay with the forfeiture of all his property, while the motorist who only kills a child outright will get off with the loss of a mere matter of two or three hundred pounds⁶⁶—plus, of course, any criminal penalty that another court may see fit to impose. This distinction of punishment unrelated to a distinction of fault offends the sense of justice. Looked at merely in terms of compensation, it is not unjust that the motorist should have to make up the film actor's loss of salary; but looked at in terms of a punishment against which it is impossible to insure, such a liability appears unjust. The only satisfactory course, so long as we maintain our present system of liability for motor accidents, is to allow the validity of the insurance policy and to leave the punishment of the offender to the discretion of the criminal court.⁶⁷

⁶⁵ See (1932) 51 *Law Notes*, p. 174.

⁶⁶ £200 was awarded for the loss of expectation of happiness of a child of four in *Hart v. Griffiths-Jones* [1948] 2 All E.R. 729.

⁶⁷ There is an even more serious objection to the suggestion considered above, in so far as it suggests that the change can be effected by judicial legislation. The suggestion was made in connection with motor manslaughter, and since motorists are not convicted of manslaughter except in heinous cases, it may seem to some not to be unjust to saddle the motorist with an inescapable liability to pay damages. However, the judges could hardly end there. By the Road Traffic Act, 1930, s. 12, it is an offence to drive without due care and attention, or without reasonable consideration for other users of the road; and if this section is literally enforced it means that the slightest negligence in driving is a criminal offence. If a policy of insurance against tortious liability for criminal offences is void except in favour of third parties, it must be void even though the negligence causing the injury is criminal only under this section, and is too slight to found a charge of manslaughter. But to

There may seem to be some inconsistency between this conclusion and my earlier submission that a person ought not to be able to contract out of liability for personal injury. The Road Traffic Act shows this inconsistency, for while it forbids the bus company to contract out of liability, presumably in the interest of road safety, it does not stop the company from getting a full indemnity from its insurers. In fact, the law has to be a compromise between competing policies, and I think that the rule in the Road Traffic Act is the best solution of a difficult problem.

The foregoing discussion of insurance applies in the same way to all contracts to indemnify against tort liability.⁶⁸

(4) If both tort and crime are deterrent systems, why are we so indifferent to the possibility that they present of double punishment? We safeguard the wrongdoer from a double criminal sanction by giving him the defence of *autrefois convict*. But a person who receives his due punishment in criminal law is not given this defence if he is afterwards sued for damages, or vice versa. Nor is the possibility that the accused may have to repair the mischief taken into account in assessing true punishment. For example, if a servant embezzles £1,000, the length of his prison sentence is not governed by the question whether he has the money ready to hand to repay, or whether it will cause him great difficulty and hardship to repay it. It is assumed that he must repay, but that does not affect punishment. The only qualification upon this is that if repayment has in fact been made, this may induce the criminal court to be lenient.

The duty to repay seems here to be regarded more as the removal of what would otherwise be an inducement to crime than as a penalty for crime. If there were no duty to repay, crime would be more lucrative than it now is, but the duty to repay is not a punishment within the rule against double punishment.

deprive the motorist of the fruits of his policy where his negligence is slight may obviously in particular cases be too severe.

Another argument against the suggestion considered in the text is as follows. The suggestion is that insurance against liability for negligence not amounting to a crime should be valid, but insurance against liability for negligence amounting to a crime should be void except in favour of third parties. On a deterrent theory that is precisely the wrong way round, for in the first case, the criminal law does not deter, and deterrence must be effected (if at all) by the law of tort; whereas in the second case the law of tort is not needed as a deterrent force because the job is done by the criminal law.

⁶⁸ Williams, *loc. cit.*

(5) If tort, like crime, is founded on deterrence, is it not sometimes a work of supererogation? The punishment for murdering a young child is death by hanging; it would be considered a ridiculous anticlimax if the law added 'and a fine of £200'. Yet we see no incongruity when the law of tort adds 'and damages of £200'. Is not this because redress to the victim or his estate is regarded as a matter of justice, irrespective of deterrence?

(6) If tort and crime are deterrent (or punitive) why is it that English courts treat criminal jurisdiction as rather strictly territorial, while allowing actions in England on foreign torts? This seems to suggest that tort has some object that criminal law has not, and this object is evidently compensation.

Contrariwise, the rule in *Machado v. Fontes*⁶⁹ regards criminal liability under foreign law as a sufficient basis for civil liability in England, which seems to imply that criminal and civil liability have the same social purpose. However, this rule is best regarded as an anomaly.

(7) By the Act of 1934, the liability to pay damages for tort generally survives the death of the tortfeasor and attaches to his estate. This is hardly reconcilable with a deterrent theory. We do not fine a criminal after his death. The prospect that one's estate may have to pay damages after one's death may certainly act as a deterrent if one is leaving property to people one cares about: but what really happens in this case is that the punishment is inflicted on the beneficiaries, and we do not think it a permissible thing to deter potential wrongdoers by threatening penalties upon their families. The Act of 1934 is justifiable on a principle of compensation; it is indefensible if the sanction is inflicted for the sake of example.

(8) In criminal law you must show not only that the accused is a wrongdoer but also the extent of his wrongdoing: he can only be punished for the wrongdoing proved against him. In tort this is not so. Suppose that X and Y pollute the same stream and, although the total of the plaintiff's damage is known, it is not known in what precise proportions X and Y are responsible. In such a case the rule is that the plaintiff's damages are shared between X and Y equally.⁷⁰ In fact, X may only have been

⁶⁹ [1897] 2 Q.B. 231.

⁷⁰ Williams, *Joint Torts and Contributory Negligence*, § 7.

5 per cent responsible; yet he is made to bear 50 per cent. On the moral theory, it is better that he should bear what may be an unjust share of the loss than that the plaintiff should bear what is certainly an unjust share. What the deterrent theory has to say on the matter I do not know.

An interesting question of policy arises where of two persons one and one only is a tortfeasor, but it is not certain which. In an American case,⁷¹ X and Y while hunting together fired simultaneously across a public highway. One of the shots fired struck P, who could not prove from which gun it came. The court enabled itself to do justice by holding that the huntsmen were joint tortfeasors; but this way of deciding the case is perhaps open to doubt. The question for our purposes is this: even if the huntsmen were not technically joint tortfeasors, should they not both be liable? If it is better that a loss should be suffered by a guilty than by an innocent man, the consequence would seem to be that P's damages should be borne by X and Y. Half his damages will then fall on an innocent person, but this is better than that the whole loss should be borne by P, who is also innocent.⁷² Such a result can be reached only (it seems) on a non-deterrent theory of tort.

(9) Whether or not tort as a whole is founded on deterrence, the law of torts to property rests, at least in part, on the notion of unjust enrichment. Restoration of ill-gotten gains is an obvious principle of justice: we enforce it partly through quasi-contract in which there is no delictual element, but partly also through the law of tort. (a) Suppose that A pays B £5 under a mistake of fact. According to the law of quasi-contract B must reimburse A on the ground that otherwise B would be unjustly enriched. The object of the rule is clearly not to deter people from receiving money under a mistake; it merely declares that if such payment

⁷¹ *Oliver v. Miles* (1927) 110 So. 666 (Miss.), noted in (1927) 36 *Yale Law Journal*, p. 886; (1927) 27 *Columbia Law Review*, p. 754.

⁷² Although the question does not commonly arise in the law of tort, it is not unusual in bastardy proceedings. At present, a woman who seeks an affiliation order to obtain weekly payments for the support of an illegitimate child may fail because she can only show that one of two men must be the father. As Dr. R. M. Jackson points out, if the object is to obtain support for the child, there is no reason why a proportion of the expense should not be borne by each man who may be the father. 'At present a premium is set on unhallowed polyandry; it is far safer for a man to share a mistress than to have her entire affections' (*The Machinery of Justice in England*, 2nd ed., p. 105, note 5).

is made it would be unfair for the recipient to keep it. (b) Now, the law of quasi-contract is limited to money. If A, instead of paying B money under a mistake of fact, gives him a watch under the same mistake, he cannot sue for the return of the watch in quasi-contract. However, this is no disadvantage to A because he can sue in tort for detinue or conversion. Tort does for chattels what quasi-contract does for money, and the root idea of quasi-contract must therefore be present also in the law of tort.

The fact that tort has to do two or more jobs instead of one—to deter people from committing wrongs and to remedy unjust enrichment—complicates the law. Consider the problem of inevitable mistake. Inevitable mistake seems logically to be a species of inevitable accident; at least it is so if we define inevitable accident as harm resulting without intention or negligence.⁷³ The law, however, treats inevitable mistake differently from other kinds of inevitable accident. Whereas, when the particular tort requires fault, there is no liability for inevitable accident in general, there is usually liability for inevitable mistake, and one reason for this (although it is not expressed in the books) is that the law of tort has to remedy unjust enrichment. For example, suppose that, honestly and reasonably believing that a piece of land belongs to me, I gather blackberries on it, and afterwards it transpires that the land belongs to you. So far as deterrence goes there is no point in making me liable in tort, for there was no fault in me. But that is not the end of the matter, for I have enjoyed the blackberries, and since they were your blackberries I ought to pay for them. The only legal means by which I can be made to do so is an action in tort. Consequently it is impossible for the law to allow inevitable mistake as a defence to the action. However, the situation is not altogether happy, ✓ for your action in tort will be treated like any other tort action, and you will get the usual measure of recompense based on your loss, instead of the measure appropriate to the notion of unjust enrichment, which would be based merely on my gain. The two things may not be the same.⁷⁴

⁷³ Cf. Salmond, *Jurisprudence*, 10th ed., p. 379 with *ibid.*, pp. 410-411 (7th ed., pp. 394, 429-430). The former passage seems to support the statement above; the latter is perhaps infelicitously worded.

⁷⁴ A similar question is capable of arising with regard to the defence of inevitable accident. Take liability in cattle trespass. (1) A horse trespasses without negligence on the part of its owner and puts its hoof through the plaintiff's tent. Inevitable accident is apparently no defence,

Our attempt to find a coherent purpose in the present law of tort cannot be said to have met with striking success. As Edwyn Bevan observed of the criminal law, 'the attempt to make a single course of action serve three, or two, wholly different purposes, commonly leads to its being unsatisfactory in its results'.⁷⁵ Where possible the law seems to like to ride two or three horses at once; but occasionally a situation occurs where one must be selected. The tendency then is to choose the deterrent purpose for torts of intention, and the compensatory purpose for other torts. *

TORT AND ADMINISTRATIVE LAW

If all notions of deterrence and ethical retribution are dropped from the law of tort, and the purpose is regarded as merely one of compensating the victim, the question arises whether this compensation cannot be better secured through a system of insurance. This course was adopted in the Workmen's Compensation Acts, which, instead of extending the employer's tort liability to his employees, created a system of industrial insurance that has since been taken over by the State. It is true that the employer's tort liability has not been excluded, and by the tardy

though the law need not be like this, and it would be more consistent with other rules to allow the defence. (2) A horse trespasses as before and has a good meal among the plaintiff's cabbages. Inevitable accident is not and cannot be a defence, for the owner of the horse cannot be allowed to profit by its free meal, and the plaintiff has no remedy other than the tort one. Unfortunately, however, the plaintiff, once given the tort action, is allowed the usual redress based on the damage done by the horse, which may be much greater than the benefit to its owner.

If the horse escaped through act of God it is possible that the courts would allow a defence in both cases, though this would fail to do complete justice in the second case. What is evidently needed is a severance of the two functions of tort or else an extension of liability in quasi-contract to the consumption of chattels.

Another illustration: P sends groceries to D, mistakenly thinking that he has ordered them; D consumes them mistakenly thinking that they come from X. In some cases it would not be just to make D pay for them, e.g., where they are luxuries that he would not have consumed had he known that he had to pay for them, or where he particularly wishes to deal with X and no one else; but in other cases D ought to pay. Assuming that he is not liable in contract (*Boulton v. Jones* (1857) 2 H. & N. 564), it seems that his only possible liability is in tort for conversion. Mistake is no defence in conversion (*Consolidated Co. v. Curtis* [1892] 1 Q.B. 495) unless (arguably) it was caused by the plaintiff's act. Thus, it is technically possible to hold D either liable or not liable in conversion; what is needed is that his liability should be measured by his unjust enrichment. ✓

⁷⁵ *Symbolism and Belief*, p. 221.

abolition of the doctrine of common employment it has even been extended; on the other hand, the extent of the liability has been reduced because the injured servant has to give credit for part of his insurance benefits.

The next step will almost certainly be the creation of State insurance against traffic accidents. Several different arguments converge upon this conclusion. The ordinary running-down case is one of casual inadvertent negligence, for which a deterrent system is comparatively ineffective, and in respect of which the demand for ethical retribution is weak. The practice of insurance against the risk has made us familiar with the idea that the important thing is to compensate the victim, and this, too, is important from a social point of view. Then there are the difficulties of trial presented by running-down cases. We have become acutely aware of the deficiencies of our system of investigating past states of fact, particularly when those facts were crowded into a few moments of time as in the case of a traffic accident.⁷⁶ Quite apart from the chance that a witness may lie,

⁷⁶ 'In the present state of substantive law, it is often necessary to seek answers to questions of fact which are necessarily difficult of ascertainment, and some of which cannot be ascertained at all. Take the question of negligence in an automobile accident case. We know perfectly well that in most cases the actual facts of the accident can never be recaptured, even by the witnesses; that the jury can never form a mental picture of the actual occurrence; and that, even if they could, it would be impossible for them to settle the issues of "negligence" and "contributory negligence" except by their own arbitrary fiat. In the present state of the substantive law of torts, the decision of automobile accident cases (and, indeed, of most negligence cases) depends on the ascertainment of facts which cannot be ascertained, and on the application to the fictitious state of facts thus constructed of a fictitious concept which neither judge nor jury wholly understand. It is all very well to call this the application of a legal standard, but what does it mean in practice? It means merely that certain more or less incomprehensible words are said to the jury by the trial judge in his instructions, so that the jurors will feel that they are taking part in a serious business and are not acting merely as the human roulette wheel in a lottery. The notion of "negligence" as it is applied in most civil litigation today is, I submit, simply a legal fiction on a grand scale. The strange part of it is that it is a fiction which neither judges, jurors, the public, nor most teachers of the law of torts suspect of being a fiction. Eliminate the need for the fiction, and most of the difficulties involved in the trial of negligence cases would disappear. This is exactly what was done when the workmen's compensation legislation superseded the old common law of master and servant. . . . If public liability insurance for all motorists were compulsory, and if all that had to be proved in an automobile accident case was the fact of accident and the character of the injury, we could have just as manageable a system for trying automobile accident cases as we have in the workmen's compensation field': Sidney Post Simpson, 'The Problem of Trial', in *David Dudley Field Centenary*

there is the possibility of imperfect observation, of failure of memory, of unconscious bias, of fallacious 'reasoning back'; there is also the possibility of having no witness at all. These dangers, which beset all legal evidence, are accentuated when the inquiry is into a sudden unexpected event. For these and other reasons the victim of negligence may fail to get compensation to which he is in justice entitled; and even a successful action involves expense to the parties and to the State. If running-down actions were abolished or curtailed we could probably do with fewer judges, court officers and lawyers, and we should relieve congestion in the cause lists.

In consequence of these various considerations proposals have been made in America that the owners of motor vehicles should be strictly liable in respect of limited compensation and should be compelled to insure against this liability.⁷⁷ In Saskatchewan a scheme of this type has actually been adopted, except that it is made a State service.⁷⁸ Such a system not only rids the plaintiff

Essays, pp. 160-161. 'Very few of us are careful and accurate observers. Those of us who are, are at our best when we can check our observations by repetition, which is exactly what is impossible in most matters where human testimony is required in court. . . . The tricks played by our senses are terrifying to the seekers of truth. . . . The evidence which is given is often not even a recollection of the events, but only a recollection of what the witness said about it soon after. You can easily see this is so. A policeman will quite often be able to relate only what appears in his note, not by any means the least satisfactory kind of evidence. Seek to take him out of his framework, and to resee the events in his mind's eye, so that some detail, not regarded at the moment but turning out to be important, can be recovered. In nine cases out of ten he cannot do it, though he honestly tries. His memory is of his note, not of an observed happening': Lieck, *Bow Street World*, pp. 238, 243. See also Max Radin, *Law as Logic and Experience*; Jerome Frank, *Courts on Trial*.

Sir Cyril Burt staged a kidnapping scene in the middle of one of his lectures. When quiet was restored, the audience was asked to write an account of the raid. On an average one statement out of four was found to be quite untrue. Cross-examination or lapse of time resulted in the errors being doubled or trebled. See *The Listener*, December 7, 1950.

⁷⁷ See 'Compensation for Automobile Accidents: A Symposium' (1932) 32 *Columbia Law Review*, p. 785; P. H. French, *The Automobile Compensation Plan* (New York, 1933).

⁷⁸ Automobile Accident Insurance Act, 1947 (c. 15); J. Green, 'Automobile Accident Insurance Legislation in the Province of Saskatchewan' (1949) 31 *Journal of Comparative Law*, p. 39; Wright in (1948) 26 *Canadian Bar Review*, at pp. 72-73.

Such a scheme if adopted in England need not eliminate deterrence altogether. The State-levied premium can be subject to a no-claim bonus, and the assured can be required to contribute up to a stated amount of the claim, just as in private insurance. Also, criminal respon-

of the necessity of proving negligence; it also saves the tribunal from the necessity of 'equating incommensurables' by finding the monetary equivalent of personal injuries. The wheel has come full circle, and the Anglo-Saxon system of pre-appointed *bót* makes a new appearance, though payable now by the State instead of the culprit.⁷⁹

Another trend that may be seen is the legislative 'concretisation' of the common-law duty of care. The general duty to see that one's vehicle is well constructed is worked out in specific statutory duties as to construction and use—though it seems that these operate only in the sphere of criminal law.⁸⁰ The employer's general duty to his servants in respect of the supply of proper plant is solidified in statutory duties like the duty to fence dangerous machinery. New enforcement officers, such as Factory and Food Inspectors, have come into existence. The tort of passing-off has been diminished in importance by the creation of a register of trade marks; river pollution is now within the purview of boards as well as of the tort of nuisance⁸¹; the same thing may happen to smoke abatement. The law of tort washed its hands of the bad farmer who let his land run to weeds,⁸² but such a person can now be dealt with administratively.⁸³ In place of the disputes over public rights of way that were formerly fought out under the ægis of the tort of nuisance, we have the provisions of the Planning Act for the mapping of such

sibility would remain, and fines inflicted could, as an accounting matter, go to relieve the insurance fund: conceivably there might be a provision for the agreement and payment of such fines out of court. A fine is meant to be punitive and cannot be insured against: to prevent evasion it might be provided that insurance against fines is not only void but itself a criminal offence. It would not be impossible to combine the scheme with a retention of the present law of tort for road accidents caused by negligence, so that the plaintiff would be able to elect between the insurance claim and the tort remedy for unliquidated damages. These embroideries upon the scheme are mentioned not because they are necessarily to be approved, but in order to indicate how opposition to the scheme that may develop in some quarters may be mitigated.

⁷⁹ This resort to ancient expedient for settling the question of compensation was suggested by Holmes as early as 1897 ('The Path of the Law', 10 *Harvard Law Review*, at p. 467). So far it has not been used in actions of tort, though something like it has made an appearance in assessment of damages for loss of expectation of happiness. Also, shipping and air-craft law knows the principle of fixed maximum liability.

⁸⁰ *Winter v. Cardiff R.D.C.* [1950] 1 All E.R. 819, at p. 821 (H.L.).

⁸¹ River Boards Act, 1948; a new Bill on the subject is now before Parliament.

⁸² *Giles v. Walker* (1890) 24 Q.B.D. 656.

⁸³ Agriculture Act, 1947, s. 12 (1).

ways by local authorities. This Act, too, extends to the sphere of æsthetics what the tort of nuisance had done for bodily comfort. The general picture is one of administrative action supplementing and even supplanting the spasmodic action of the law of tort, on the principle that prevention is better than punishment, control better than compensation. ✓

THE THIRD MAN
OR
NOVUS ACTOR INTERVENIENS

A. L. GOODHART

You will remember that in the film *The Third Man* the mystery was solved when it was discovered that the crime had been committed by a third man of whose existence no one was aware at the time. In the law of tort there is also a mysterious third man—the *novus actor interveniens*—who keeps appearing and disappearing in a way which is most confusing. If only we could eliminate him from the plot, a major mystery in the law would disappear. The trouble is that by calling something a *novus actus interveniens* we suggest that we have found an answer to a problem when in fact we have failed to do so. We may also give an appearance of rationality to an irrational conclusion by saying that it is based on a principle which is so important that it has to be phrased in Latin. There is a vague feeling that a *novus actus* either prevents liability from arising or that it brings such liability, if it has already arisen, to an end, but no one has stated this principle with any precision. Its very vagueness gives it greater influence in the books than it would have if it were more exact.

This mysterious legal character takes various forms. The most impressive, of course, is the Latin *novus actor interveniens*, but he also appears as a *new intervening cause* and, even more uncertainly, as the *proximate cause*. In this lecture I cannot do more than refer to a few of the legal occasions on which the *novus actor* has made his appearance, and to suggest that that appearance has, to my mind, not proved helpful. The five occasions to which I shall refer are the rule in *Rylands v. Fletcher*, liability for wild or dangerous animals, the law of defamation, the law of negligence, and liability for the consequences of a tortious act.

THE THIRD MAN AND THE RULE IN RYLANDS V. FLETCHER

In the Court of Exchequer Chamber Blackburn, J., stated what has come to be known as the 'Rule in *Rylands v. Fletcher*'¹ in the following words: 'We think that the true rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape'. This statement was cited with approval in the House of Lords² by Lord Cairns, L.C., who emphasised that the rule was applicable only where the user was not 'for any purpose for which it might in the ordinary course of the enjoyment of land be used'. If Blackburn, J.'s judgment had ended with the words I have quoted, then it would have been reasonable to hold that a person who creates such an extraordinary risk for his own purposes ought to be held liable if the dangerous thing escapes, even though the escape is due to the wilful or negligent act of a third person or to an act of God. There is much to be said for this view both from the theoretical and the practical standpoint.

It is clear that this strict liability is based not on negligence but on allocation of risk. The law does not purport to penalise the creator of the risk, but places him in the position of an insurer. But an insurer cannot plead that the accident insured against has been caused by the voluntary act of a third person or by an act of God, because these form integral parts of the risk.³ From the practical standpoint the argument is equally strong. If my neighbour chooses to store dynamite in a shed abutting on my house, why should he not be held responsible if the dynamite is set off either by lightning or by a malicious trespasser? It is he who has created the risk which has caused the destruction of my property. I may not even know that he has stored the dynamite there, so that I cannot myself insure against the possible damage. On the other hand, he knows exactly what the conditions are, and he can, therefore, protect himself financially.

Unfortunately, to my mind, Blackburn, J., was over-cautious

¹ (1866) L.R. 1 Ex., at p. 279.

² (1868) L.R. 3 H.L. 330, at p. 340.

³ Nor, as a general rule, can he plead that the accident was caused by the negligence of the assured himself.

in his judgment. Having stated the rule in general terms he was anxious to make it clear that he was not deciding any matters which were not before him for consideration. He therefore added the following words: 'He (the defendant) can excuse himself by showing that the escape was owing to the plaintiff's default⁴; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient'.

This hesitant suggestion was seized upon by the Court of Exchequer in *Nichols v. Marsland*⁵ in 1875. In that well-known case the defendant had built three artificial pools or lakes on her land, the largest covering eight or nine acres. Owing to an extraordinary and unprecedented rainfall the artificial embankments gave way, and the escaping water destroyed four bridges belonging to the plaintiff. At first sight this would seem to be exactly the sort of case that ought to be covered by the rule in *Rylands v. Fletcher*, because if the defendant is to be held liable only in circumstances where an embankment gives way under ordinary rainfall, then there is little or no reason for the rule: a defendant would then be liable in an ordinary action for negligence, on the ground that he had not taken reasonable care to avoid a consequence that could reasonably be foreseen.

The Court of Exchequer, in a judgment delivered by Bramwell, B., held the defendant not liable on the ground that the act was that of an agent she could not control. That strong individualist said: 'What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges'. *Rylands v. Fletcher* was distinguished on the ground that 'here the defendant merely brought it (the water) to a place whence another agent let it loose'. The judgment was affirmed

⁴ In 1866, when *Fletcher v. Rylands* was decided, contributory negligence destroyed the plaintiff's cause of action. The Law Reform (Contributory Negligence) Act, 1945, has altered the law in this regard, so that the loss is now divided between the parties according to their responsibility. It is submitted that this principle ought to be applied in the *Rylands v. Fletcher* type of case where the escape is due to the plaintiff's negligent default. It is clear that if the plaintiff has *intentionally* caused the escape then he cannot recover, just as an assured cannot recover if he has *intentionally* caused the accident.

⁵ (1875) L.R. 10 Ex. 255.

on appeal,⁶ Mellish, L.J., saying: 'A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant'. It is obvious that the court was here talking in terms of fault and of causation, and not in those of protection and allocation of risk. At that time it does not seem to have been realised by the courts that a new principle, not based on negligence, had been established by *Rylands v. Fletcher*.

This same emphasis on fault is found three years later in *Box v. Jubb*,⁷ in which the defendant's reservoir overflowed because water from another reservoir was poured into it. In holding the defendant not liable Kelly, C.B., said: 'The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible—did it proceed from their act or default or from that of a stranger over which they had no control?' Here, again, the defendant is excused because of the wrongful act of a stranger, although, it is submitted, the pertinent question, under *Rylands v. Fletcher*, ought to have been, did the defendant create an unusual risk.

The high water mark of the 'fault' doctrine may be said to have been reached in *Rickards v. Lothian*⁸ in 1913, when the Judicial Committee cited with approval both *Nichols v. Marsland*⁹ and *Box v. Jubb*.¹⁰ A lavatory basin, in rooms occupied by the defendant on the top floor of his house, was maliciously plugged by an unknown third person, with the result that the water overflowed and damaged the plaintiff's property on the second floor. The main point at issue was whether the defendant had been negligent in not providing an adequate escape for overflow water, but, this having been decided in favour of the defendant, the plaintiff then argued that he was entitled to recover under the rule in *Rylands v. Fletcher*. Their Lordships, in a judgment delivered by Lord Moulton, had no difficulty in holding that the rule could not be applied to ordinary plumbing arrangements, for this was not 'some special use bringing with it increased danger to others'. It would be absurd to suggest that

⁶ (1876) L.R. 2 Ex.D. 1, at p. 5.

⁷ (1879) 4 Ex.D. 76.

⁸ [1913] A.C. 263.

⁹ *Supra*, n. 6.

¹⁰ *Supra*, n. 7.

there was anything unusual in having running water in a house.

For our purpose the important point is that they also specifically held that 'a defendant is not liable on the principle of *Fletcher v. Rylands* for damage caused by the wrongful acts of third persons', because a defendant cannot 'be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant'.¹¹ It is to be noted that, on this principle, no distinction can be drawn between a malicious and a negligent act of a third person, for in neither case can the defendant exercise control.¹¹ Under this doctrine only the *novus actor interveniens* can be held liable, for he is the immediate cause of the injury, while the person who has created the dangerous situation escapes all responsibility.

Four years later, in *Greenock Corporation v. Caledonian Railway*,¹² the House of Lords reached a startlingly different conclusion. The defendants had constructed a concrete paddling pool which altered the flow of a stream. Owing to rainfall of extraordinary violence the stream overflowed the pool, and a great volume of water damaged the plaintiff's property. Their Lordships unanimously held the defendants liable. Lord Finlay, L.C.,¹³ accepted the view that the defendants were bound 'to provide against the ordinary operations of nature, but not against her miracles'. He did not say how one was to determine what constituted a miracle, but he held that extraordinary rainfall was not, in the Scottish term, a *damnum fatale*. Lord Shaw¹⁴ held that the defendant was liable even though the 'fall was extraordinary or even unprecedented in quantity'. As these are the exact words that were used in *Nichols v. Marsland*¹⁵ it seems difficult to reconcile the two cases except on the ground that it takes more evidence to establish a miracle in Scotland than it does in England. It is not easy for an English lawyer to determine exactly what is meant by the Scottish *damnum fatale*, for

¹¹ This point is clearly made in Salmond, *Torts*, 10th ed., p. 142: 'It would not appear that in principle it matters whether the *novus actus* be justifiable, lawful, negligent or criminal or whether it be the act of the plaintiff or of a third party'.

¹² [1917] A.C. 556.

¹³ At p. 572. He cited Lord Cockburn's judgment in *Samuel v. Edinburgh and Glasgow Co. Rly.* 13D. 312, at p. 314.

¹⁴ At p. 579.

¹⁵ *Supra*, n. 6.

no case was cited in which this defence seems to have proved successful.

Once *Nichols v. Marsland* is discredited it is hard to see how the defence of *novus actus interveniens* or of act of God when applied to the rule of *Rylands v. Fletcher* can be supported, for the *Nichols Case* was the foundation-stone for all the subsequent cases. In the *Greenock Corporation Case* Lord Finlay, L.C., cited with approval this statement of the law by Lord Justice-Clerk Hope in *Kerr v. Earl of Orkney*¹⁶: 'It is no defence in such a case to allege the dam would have stood against all ordinary rains—it gave way in an extraordinary and unprecedented fall of rain, which could not be expected. The dam must be made perfect against all extraordinary falls of rain—else the protection is not afforded against the operation which the party must accomplish'. // This dictum draws the essential distinction between *the duty of protection* which is owed under *Rylands v. Fletcher* and *the duty of care* which is owed in ordinary negligence cases. // The duty of protection cannot be limited to reasonably foreseeable operations on the part of nature or of man, for then it will be no greater than the ordinary duty of care: if it is to have any meaning it must include protection against all dangers which the new situation has created, even the danger that men may act stupidly or maliciously.

It is an extraordinary fact that *Greenock Corporation v. Caledonian Railway*¹⁷ does not seem to have been cited to the Judicial Committee in 1936 in *Northwestern Utilities Ltd. v. London Guarantee and Accident Co.*¹⁸ In this case the plaintiffs' hotel was destroyed by fire owing to the escape of gas from a broken pipe belonging to the defendants. The break in the pipe had been caused by the independent operations of a third party. The Judicial Committee held that the rule in *Rylands v. Fletcher* was not applicable to these facts because 'the rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in *Box v. Jubb*, which was approved by the Judicial Committee in *Rickards v. Lothian*; and not to any negligence of the defendants'. No reasons other than precedent authority

¹⁶ 20D. 298.

¹⁷ *Supra*, n. 12.

¹⁸ [1936] A.C. 108.

were advanced for limiting the rule in this way. Having held that the defendants were not liable on the *Rylands v. Fletcher* principle, the Judicial Committee reached the conclusion that they were liable in negligence in having failed to foresee and guard against the wrongful act of the third party. The odd result of this case is that liability under the *Rylands v. Fletcher* principle is narrower in scope than it is under the doctrine of ordinary negligence when an act of God or of a third person is concerned. The protection which the rule of strict liability is supposed to afford thus becomes, in large part, illusory.

I believe that a more logical conclusion is reached by the American cases, which hold that strict liability is based on the principle of allocation of risk, and that a person who has created an unusual risk is liable if harm results from it even though the immediate cause was an act of God or of a third party. On this point the American Law Institute's *Restatement of the Law of Torts* reads as follows :

‘§ 522. *Contributing Actions of Third Persons, Animals and Forces of Nature*

One carrying on an ultra-hazardous activity is liable for harm under the rule stated in § 519, although the harm is caused by the unexpectable

- (1) innocent, negligent or reckless conduct of a third person, or
- (2) action of an animal, or
- (3) operation of a force of nature.

Comment :

Rationale. The reason for imposing absolute liability upon those who carry on ultra-hazardous activities is that they have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community. If the risk ripens into injury it is immaterial that it is made effective in harm by the unexpectable action of a human being, an animal or a force of nature. This is so, irrespective of whether the action of the human being which makes the ultra-hazardous activity harmful is innocent, negligent or even reckless (compare § 510).

Caveat:

The Institute expresses no opinion as to whether the fact that the harm is done by an act of a third person, which is not only deliberate but is intended to bring about such harm, relieves from liability one who carries on an ultra-hazardous activity'.

THE THIRD MAN IN DANGEROUS ANIMAL CASES

In his judgment in *Nichols v. Marsland*¹⁹ Bramwell, B., said: 'I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable'.

There is much to be said for this view because liability in such circumstances would be based on the protection principle. The possessor of such an animal is not committing any wrong by keeping it, but he is creating an extraordinary risk which ought to fall on him and not on his neighbour. Here again, as a practical matter, the possessor of the animal can protect himself by insurance, while the victim of the animal's aggression cannot do so, as he may be totally ignorant of the animal's existence until he is attacked.

Fortunately, the question has been answered conclusively by the Court of Appeal in *Baker v. Snell*,²⁰ so that it would require a decision of the House of Lords to alter the law in the way that the majority of the textbook writers seem to favour. In the *Baker Case* the defendant kept a savage dog which his servant brought into the kitchen, saying, 'I will bet the dog will not bite any one in the room'. He then let the dog go, and it flew at the plaintiff and bit her. The County Court judge held that the defendant was not liable, but the Divisional Court ordered a new trial on two grounds, (1) that it was a question of fact for the jury whether the servant was acting within the scope of his employment (Channell, J.) and (2) that the owner of an animal known to be savage keeps him at his peril and is liable 'even though the injury is directly brought about by the wilful act of a third person' (Sutton, J.). The Court of Appeal unanimously affirmed the Divisional Court judgment on ground (1), but Kennedy, L.J., dissented on ground (2). The reasons given by the

¹⁹ *Supra*, n. 5.

²⁰ [1908] 2 K.B. 825.

majority are, perhaps, not as clearly expressed as one might have wished, but it has never been suggested that the authority of a precedent depends on the force of the arguments advanced in its support. Kennedy, L.J., dissented 'on grounds of justice' because 'there is nothing culpable or wrong in keeping an animal *ferae naturae*'; therefore, he argued, the keeper ought not to be held liable for 'the criminal act of a third party' in letting it get loose.

If the keeper is not to be held liable for the criminal act of a third party, then, by the same reasoning, he ought not to be held liable for his negligent act, for in neither case has he any control over him, but if the latter is excluded then we are back to the ordinary law of negligence. The truth is we must either choose the protection principle or the negligence principle: there is no half-way house between them. Kennedy, L.J.'s most convincing argument was that the animal cases and the reservoir cases, such as *Nichols v. Marsland*,²¹ ought to be answered on the same principle. If I may say so, I am in complete agreement with this view, but where I differ from the view expressed by the Lord Justice is in the assumption that *Nichols v. Marsland* was correctly decided. For all practical purposes it has been overruled by the *Greenock Corporation Case*.²²

When we turn to the textbook writers we find that Dr. Stallybrass, in speaking of *Baker v. Snell*,²³ said that²⁴ 'there was such a conflict of judicial opinion that it is difficult to determine what the case decided or to regard it as authority'. A conflict of judicial opinion has never hitherto affected the authority of a case; on the contrary, it sometimes gives it added force because it makes it clear what the particular point at issue was. If Kennedy, L.J., in the *Baker Case*, had not been of the opinion that the majority of the Court of Appeal were deciding that the keeper of a dangerous animal was liable for injury done by it, even though it had been set free by a third person, it would not have been necessary for him to deliver a long dissenting judgment on this point. Dr. Stallybrass reached the conclusion that²⁵ 'if I keep a tiger shut up in a cage or a fierce dog tied up by a

²¹ *Supra*, n. 6.

²² *Supra*, n. 12.

²³ *Supra*, n. 20.

²⁴ Salmond, *Torts*, 10th ed., p. 552.

²⁵ *Ibid.*, p. 553.

chain, I should be held free from liability although a trespasser opens the cage or unlooses the chain'. That is a matter of opinion, but it is certainly not the opinion of the majority in *Baker v. Snell*, and it will not, therefore, be the law until that case is overruled by the House of Lords.

Professor Winfield²⁶ also dislikes *Baker v. Snell*, but he does not deny that it is a binding authority. He concludes that 'it leads to results which are not only inherently unjust but also inconsistent with every other rule of strict liability'. He does not explain why it is inherently unjust that a man who chooses to keep a dangerous tiger should be held strictly liable to his neighbour if the tiger escapes for any reason and injures him. Following Kennedy, L.J., he says that 'there appears to be no reason why the keeper of a savage animal, as contrasted with the keepers of other dangerous things, should be singled out as such a malefactor that he must be deprived of a defence which is allowed to them'. On this point I agree with Professor Winfield that all keepers of dangerous things should be treated alike, but where I disagree with him is as to the nature of the treatment. I believe that they should all be treated as insurers, and that the only permissible defence is that the accident or escape was due to the plaintiff's own intentional act.

Professor Glanville Williams, in his well-known book *Liability for Animals*,²⁷ is more cautious in his criticism of *Baker v. Snell*.²⁸ He says: 'Finally, despite the predominant modern opinion that the mere keeping of an animal is not wrongful, it is a tenable view that the keeping of some very dangerous animals without adequate reason ought to be regarded as negligence'. My own view is that it would be a retrograde step to deal with dangerous animals under the concept of negligence: I prefer to regard the problem as one of allocation of risk, with the risk being placed on the keeper of the animal.

I shall not discuss the somewhat analogous question whether the act of a third party or the act of God is a defence in an action of cattle-trespass, as this would involve a detailed analysis of the principle on which 'cattle trespass' is based. Professor Williams has considered this point at length in his book.²⁹ The

²⁶ *Textbook of the Law of Tort*, 5th ed., p. 546.

²⁷ At pp. 334-336.

²⁸ *Supra*, n. 20.

²⁹ At pp. 181-185.

conclusion reached seems to be that the law is uncertain on this point.

Finally, I should like to quote the American Law Institute's *Restatement of the Law of Torts* on liability for dangerous animals :

‘§ 510. The possessor of a wild animal or an abnormally dangerous domestic animal is liable under the rules stated in § 507–9 although the harm would not have occurred but for the unexpectable

- (1) innocent, negligent or reckless conduct of a third person, or
- (2) action of another animal, or
- (3) operation of a force of nature.

Caveat:

The Institute expresses no opinion as to whether the rule stated in this section is applicable where an unexpectable act of a third person intended to bring about the harm done by the animal is a contributing cause thereof.

Comment:

The keeper of a wild or an abnormally dangerous domestic animal is subject to liability even in the absence of his negligence in its custody, because by keeping it he introduces into the locality a danger which is not only uncommon therein but also unnecessary to satisfy any social purposes. Therefore, those who keep such animals are liable even though the danger which they have created is made effective in harm in a manner which they had no reason to expect’.

THE THIRD MAN IN THE LAW OF DEFAMATION

The law of defamation, having been developed in a peculiarly haphazard fashion, is a branch of the law which cannot give rise to special enthusiasm on the part of those who are concerned more with the efficiency than they are with the history of the legal system. There is certainly one minor rule for which few lawyers have a good word to say even though it has lasted 120 years. The best that can be said for the rule in *Ward v. Weeks*³⁰

³⁰ (1830) 7 Bing. 211.

is that the point with which it is concerned does not frequently arise. In that case the defendant slandered the plaintiff to one Bryce who repeated it to Bryer. As a result the latter refused to carry on business relations with the plaintiff. In the Court of Common Pleas, Tindal, C.J., in holding that on these facts there was no proof of special damage, said ³¹: 'Every man must be taken to be answerable for the necessary consequences of his own wrongful acts: but such a spontaneous and unauthorised communication cannot be considered as the necessary consequence of the original uttering of the words. . . . It was repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage'.

The Chief Justice speaks of 'necessary consequences', but few consequences are ever necessary in the sense of being inevitable. The usual question is whether they are foreseeable, and it is difficult to deny that it is foreseeable that a slander, once having been uttered, will be repeated. The main ground on which the decision was based was that the person who repeated the slander was not under the defendant's control, and that therefore the defendant could not be answerable for his act.

Here we have the *novus actus interveniens* doctrine in its extreme form. This doctrine, as we hope to show hereafter, has been rejected in the case of other torts, but it has succeeded in lingering on in defamation cases. In 1892, in *Ratcliffe v. Evans*,³² Bowen, L.J., citing *Ward v. Weeks*, said, 'the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorised repetition'; if, instead of speaking in terms of a physical metaphor which can so easily prove misleading, the Lord Justice had discussed the question from the standpoint of reasonable foresight, it would have been more difficult for him to explain why the defendant should not have been held liable for an injury he could foresee. Eighteen years later, in *Weld-Blundell v. Stephens*,³³ the majority of their Lordships referred to *Ward v. Weeks* with approval: it might even be suggested that they regarded the rule in that case as one of general application. This can be considered more conveniently, however, when we discuss the problem arising in the

³¹ At p. 215. ³² [1892] 2 Q.B. 524, at p. 530.

³³ [1920] A.C. 956.

negligence cases. It is safer, however, to say as Dr. Stallybrass did,³⁴ that 'cases of defamation are an exception to the general principle' that 'a foreseeable *novus actus* does not break the chain of causation'. As the situation covered by *Ward v. Weeks* arises only on rare occasions, that case, as I have suggested, does only a limited amount of injustice, but, unfortunately, it is not always recognised that it is an exception limited to the law of defamation; it may, therefore, cause mischief in other branches of the law.

THE THIRD MAN AND THE LAW OF NEGLIGENCE

When we turn to other torts, and especially the law of negligence, the number of cases in which the *novus actus interveniens* has played a confusing part is so large that it is possible to refer only to the most interesting ones.

Pride of place must go to *Weld-Blundell v. Stephens*.³⁵ The facts are too well known for me to have to repeat them here, but I must read a quotation from Lord Sumner's judgment, because to my mind it is a perfect illustration of what I call the mechanical test of liability³⁶: 'In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause—e.g., *Cobb v. Great Western Ry. Co.*,³⁷; *Attorney-General v. Conduit Colliery Co.*³⁸ It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that, in a word, he insulates A from C'.³⁹

³⁴ Salmond, *Torts*, 10th ed., at p. 151.

³⁵ *Supra*, n. 33.

³⁶ At p. 986.

³⁷ [1894] A.C. 419.

³⁸ (1894) 11 T.L.R. 57.

³⁹ At p. 988 Lord Sumner said: 'That a jury can finally make A liable for B's acts merely because they think it was antecedently probable that B would act as he did apart from A's authority or intention seems to me to be contrary to principle and unsupported by authority'. Dr. Stallybrass's comment was (Salmond, *Torts*, 10th ed., at p. 142): 'This, undoubtedly, is a hard saying'. This is an understatement: experience has shown that it is an incorrect saying.

Not being an engineer myself I have always had difficulty in following an idea which begins as a chain, changes into a conduit pipe, then becomes a transmission gear, and ends as a piece of insulation. My only comment is that four metaphors do not constitute one argument. I cannot see why a wrongdoer should not be liable for the foreseeable act of a third person whether you call him a transmission gear or not.

Lord Dunedin and Lord Wrenbury both concurred with Lord Sumner, but apparently they did so solely on the authority of *Ward v. Weeks*,⁴⁰ as they cited no other cases. It is doubtful, therefore, whether or not they intended their conclusion to be of general application.

It is important to note that Lord Sumner's interpretation of *Cobb v. Great Western Railway Co.*⁴¹ suggests that it decided more than it did. In that case the Earl of Selborne said⁴²: 'On the plaintiff's pleading it is not shown that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery'. All that that case established, therefore, is that it is not so reasonably foreseeable that an overcrowded carriage will conduce to a robbery, as to make failure to prevent such overcrowding negligence on the part of the railway company. If, on the other hand, a company knowingly placed a passenger in the same carriage with a homicidal maniac, it could hardly plead, if the passenger were attacked, that it was not responsible because the act of the maniac constituted a *novus actus interveniens*.

With all respect to Lord Sumner, I cannot help feeling that Viscount Finlay's judgment, although less metaphorical, is more persuasive. He said⁴³: '. . . you must take human nature as it is, and it is precisely because there are mischievous and dishonourable people about that it is necessary to be very careful in the custody of such documents. The fact that the damage was caused by the act of some third person does not prevent its being recoverable if such an act was a natural and probable consequence even though wrongful'. Under this interpretation the *novus actus* does not play an independent role, but is only one element, among many others to be taken into consideration,

⁴⁰ *Supra*, n. 30.

⁴¹ *Supra*, n. 37.

⁴² At p. 424.

⁴³ At p. 973.

in determining whether or not there has been reasonable foresight.

The next case in which the *novus actus* played an important part was in *Cutler v. United Dairies (London) Ltd.*⁴⁴ Scrutton, L.J., held that the owner of a horse which had been negligently allowed to run away could not be held liable to a volunteer who had tried to stop it because his voluntary act constituted 'a new intervening cause'. The Lord Justice did not discuss the question whether the voluntary intervention could have been reasonably foreseen.

It was only two years later that the Court of Appeal discarded the 'new intervening cause' principle, and substituted for it the test of reasonable foresight. In *Haynes v. Harwood*⁴⁵ there was a double instance of a *novus actus*. The first was when a mischievous boy threw a stone at the horses which had been left unattended: the second was when the plaintiff rushed out and stopped the horses. The Court of Appeal held that the so-called principle relating to the *novus actus* was not applicable to either of these circumstances.

Greer, L.J., stated the law in these terms⁴⁶: 'If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (1854), 9 Ex. 341, the accident can be said to be "the natural and probable result" of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving the damage is the result of the wrongful act'.⁴⁷

The principle of *Haynes v. Harwood* was extended to the

⁴⁴ [1933] 2 K.B. 297.

⁴⁵ [1935] 1 K.B. 146.

⁴⁶ At p. 156.

⁴⁷ Greer, L.J., cited Rigby, L.J.'s judgment in *Engelhart v. Farrant & Co.* [1897] 1 Q.B. 240, at p. 246: 'It was argued, with some show of authority I agree, that whenever between the negligence of a servant and the incident the act of some third person intervenes, and is the proximate cause of the accident, the employer is not liable. I do not consider that that is the state of the law upon the authorities . . . the question is a question for a jury . . .'. That is to say, it is a question of fact.

rescue of property in *Hyett v. Great Western Ry.*⁴⁸ Tucker, L.J., held that the question was whether the intervening act 'was the kind of act which the railway company might reasonably have anticipated as likely to follow from their act of negligence in leaving the leaking paraffin on this siding'.

Finally, there are two recent cases in the Court of Appeal which have made it clear that a defendant will be held liable for the foreseeable acts of a third person, even though the third person is completely independent and is doing a consciously wrongful act.

In *Stansbie v. Troman*⁴⁹ the defendant wrongfully left the front door of the plaintiff's house open. A thief entered and stole some property. The Court of Appeal held that the defendant was liable for this *novus actus interveniens* as it was reasonably foreseeable. It must be noted that this was a contract case, but there was nothing in Tucker, L.J.'s judgment to suggest that the reasons given by the court were not equally applicable to a case in tort. He emphasised that 'the very act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened'.

In *Davies v. Liverpool Corporation*⁵⁰ a passenger on a tram-car pushed the starting bell with the result that the plaintiff, who was boarding the tramcar, fell and was injured. If the conductor had been on the platform, as he should have been, this would not have happened. The Court of Appeal held that the act of the passenger could not be regarded as a new independent cause, Denning, L.J., saying: 'an unauthorised or wrongful act of a third person does not break the chain of causation if it might reasonably have been foreseen'.

The recent cases have, therefore, shown that as far as the negligence cases are concerned it is meaningless to talk in terms of a *novus actus interveniens*. The liability of the defendant depends on whether or not he could reasonably have foreseen the consequences, including the acts of third persons, and should have guarded against them, and not on whether there was a new independent cause, whatever that may mean. This formula will not, of course, solve any cases by itself because it will always be

⁴⁸ [1948] 1 K.B. 345.

⁴⁹ [1948] 2 K.B. 48.

⁵⁰ [1949] 2 All E.R. 175.

a question of fact what, under the circumstances, the defendant ought to have foreseen, but it has the advantage of clarity which the doctrine of 'intervening cause' so obviously lacks.

Thus it is foreseeable that 'children acting in the wantonness of infancy'⁵¹ may act in a dangerous or unreasonable manner, but it does not follow from this that we can assume that all adults are careful. In *Philco Radio and Television Corporation Ltd. v. J. Spurling, Ltd.*⁵² the defendants had, owing to their carman's mistake, delivered five cases of cellulose film scrap at the plaintiff's factory. When one of the cases was opened the mistake was discovered, but before it could be repacked a typist touched with her cigarette a small pile of the scrap with the result that a serious explosion was caused damaging the plaintiff's factory. The Court of Appeal, with some hesitation, affirmed the judgment in favour of the plaintiffs, doubt being expressed by Jenkins, L.J., whether it was reasonably foreseeable that a mischievous person, who was not a child or a pyromaniac, might deliberately set light to the material for the purpose of seeing what kind of a fire it would make. Perhaps a university professor will be more readily prepared to accept the view that even adults may consciously act in an irrational manner, than will a judge trained in the intellectual atmosphere of a Chancery court. This, however, is a question of fact and not of law.

THE THIRD MAN AND LIABILITY FOR THE CONSEQUENCES
OF A TORTIOUS ACT

So far I have been speaking of the *novus actus* in relation to the initial liability for negligence. There the question is whether this intervention has prevented any tortious liability from arising. Now I want to discuss briefly the further question which concerns liability for the consequences of a wrongful act. In these circumstances it has been proved that the defendant has committed a tort against the plaintiff, but it is denied that the particular injury which the plaintiff has suffered is the legal consequence of the tort. The word *legal* must be stressed, because it is obvious that the law cannot hold a man liable for all the consequences of his acts, however wrongful they may be. In 1914 a man crooked his finger, pulled it back, and thereby

⁵¹ *Latham v. R. Johnson & Nephew Ltd.* [1913] 1 K.B. 398.

⁵² [1949] 2 All E.R. 882.

fundamentally altered the lives of every person in this room. When Gavriolo Princep shot the Austrian Archduke he started a chain of consequences which will never end. As it would clearly be absurd for the law in such a case to say that the wrongdoer was legally responsible for all the consequences of his wrongful act, some limitation must be placed on the extent of his responsibility. It has been generally recognised that *Hadley v. Baxendale*⁵³ laid down the *foreseeability* test, while *Re Polemis*⁵⁴ is said to have established the *direct consequence* test. This distinction is of great importance for the purpose of this lecture, because, as Dr. Stallybrass has said⁵⁵: 'It is in dealing with the effect of a *novus actus interveniens* that the divergence between these two views is most marked'.

I have elsewhere⁵⁶ expressed the view that the so-called rule in *Re Polemis* is in conflict with the basic principles of the law of torts, but that is immaterial for my present purpose. What I want to emphasise now is that the rule, instead of extending the liability of the tortfeasor, as it is generally believed to do, must have the effect of narrowing it in most cases. It is true that in *Re Polemis*, on the special facts as found by the arbitrator,⁵⁷ the direct consequence rule enabled the plaintiffs to recover damages for unforeseeable consequences, but in most other cases the direct consequence rule will limit the defendant's liability. Thus in *Weld-Blundell v. Stephens*⁵⁸ Viscount Finlay, who was applying the foreseeability test, was in favour of holding the defendant liable for the injury he had caused, while Lord Sumner, who was applying the direct consequence rule, reached the conclusion that the defendant, although he could have foreseen the injury which resulted from his negligent act, was not liable because the injury was not a direct one, being due to the intervention of a third party.

It was in this connection that Lord Sumner made the state-

⁵³ (1854) 9 Ex. 341.

⁵⁴ [1921] 3 K.B. 560.

⁵⁵ *Op. cit.*, n. 24, p. 141.

⁵⁶ *Cambridge Legal Essays* (1926), 'Liability for the Consequences of a "Negligent Act"'.

⁵⁷ The difficulty in the *Polemis Case* was due to the fact that the arbitrator found that it was not reasonably foreseeable that a plank dropped in the petrol-vapour filled hold of a ship might cause an explosion. This finding, it is submitted, is contrary to common experience.

⁵⁸ *Supra*, n. 33.

ment which has been so frequently quoted⁵⁹: 'What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation'. Therefore, as used by Lord Sumner, the direct consequence rule narrows the extent of the tortfeasor's liability whenever there is a *novus actus interveniens*, even though the indirect consequence produced by it was clearly foreseeable. This result seemed to Dr. Stallybrass so contrary to general principle that he suggested that we might say⁶⁰ 'that all foreseeable consequences are direct consequences', but this would be in conflict with Lord Sumner's interpretation, and would leave the rule with little meaning.

My own view is that there is no justification for the mechanical direct-consequence test. If the tortfeasor can reasonably foresee that his wrongful act may lead a third person to injure the plaintiff, whether intentionally or not, I can see no reason why he should not be held liable for such an injury. I believe that the foreseeability test is more flexible than the direct consequence rule, and that it enables the courts to arrive at more satisfactory results. To allow a defendant to shield himself behind a third man, who may be only a man of straw, must lead to injustice, but this will be the result if we hold that an intervening cause must automatically break the so-called chain of causation.

CONCLUSION

May I, in conclusion, summarise the points I have tried to make in this lecture.

(1) The phrase *novus actus interveniens* is an unfortunate one because it suggests that a wrongdoer's liability must come to an end when a third person intervenes in any way. This is not true.

(2) This misconception has had an unfortunate influence on the interpretation of the Rule in *Rylands v. Fletcher*.⁶¹ In certain cases it has been held that the defendant is not liable if the escape of the dangerous thing is due to an act of God, or to the wrongful act of a third person. As the basis of the rule is

⁵⁹ At p. 984.

⁶⁰ *Op. cit.*, n. 24, p. 144.

⁶¹ *Supra*, n. 2.

protection against the unusual risk created by the defendant, the defence of *novus actus interveniens* has no logical justification.

(3) The same point has arisen in regard to dangerous animals. In *Baker v. Snell*,⁶² the Court of Appeal held that the possessor of a dangerous animal was liable for an injury caused by it, even though its escape was due to the voluntary act of a third person. This decision has been criticised by the textbook writers on the ground that it is in conflict with *Nichols v. Marsland*.⁶³ It is submitted that it is *Nichols v. Marsland* which was incorrectly decided.

(4) In the defamation cases it has been held that the repetition of the defamatory statement by a third person constitutes a *novus actus interveniens*, which prevents the original defamer from being held responsible for the damage caused by the repetition. This rule, although now regarded as an exception, has had an unfortunate influence on the development of the law.

(5) In other tort cases it has sometimes been suggested that a *novus actus* breaks the chain of causation, but the recent cases have made it clear that the sole question at issue is whether or not the intervention could reasonably have been foreseen.

(6) There are two conflicting views concerning the liability of a tortfeasor for the consequences of his act. The first holds that he is liable for all the foreseeable consequences, including the intervention of a third party, while the second holds that he is liable only for the direct consequences, the intervention of a third person constituting a new independent cause. The second view, while finding some support in the textbooks, does not seem to have been followed in any recent case.

I therefore conclude this lecture with the suggestion that the Third Man is an admirable character of mystery in the film, but that when he appears in the law of tort, disguised as a *novus actor interveniens*, he is a source of misunderstanding and confusion. He is nothing less than a nuisance.

⁶² *Supra*, n. 20.

⁶³ *Supra*, n. 6.

‘NOVUS ACTUS INTERVENIENS’ IN ROMAN LAW

RAPHAEL POWELL

IN English law the question of the effect of a *novus actus interveniens* is raised when human activity intervenes between the act of the defendant and the damage suffered by the plaintiff. The reason why the intervening activity of an animal is not regarded as a *novus actus* may be an assumption that human beings are intelligent and animals are not. The act of a person who is not fully responsible for his acts, such as a ‘child acting in the wantonness of infancy’,¹ is sufficient to constitute a *novus actus*.² But the mischievous activity of a seemingly intelligent chimpanzee is, at most, a real link or a missing link in a chain of causation. Nevertheless, whether the brakes of the car which I leave on a hill are tampered with by a chimpanzee, a child of tender years or a Professor of Jurisprudence, my liability for any damage which may result from the car’s subsequent movements is, or ought to be, tested by the same principle. Provided that the intervening event is relevant to my liability at all, the question in every case is: Could a reasonable man, in the same circumstances as myself, have foreseen what was going to happen?

This lecture will be concerned mainly with the intervening acts of human beings. In Roman law, however, as indeed in other early systems of law, an animal was liable for its own wrongs. Of course the plaintiff did not sue the animal. He sued the owner³ in the *actio de pauperie*. In that action, if the plaintiff was successful, the owner must either give up the animal to the plaintiff or pay damages; but the wrong was that of the animal and not of the owner.⁴ However, although the animal was the guilty party, the action brought against the owner was

¹ See *Latham v. Johnson* [1913] 1 K.B. 398, *per* Hamilton, L.J. (later Lord Sumner), at p. 413; *Weld-Blundell v. Stephens* [1920] A.C. 956, *per* Lord Sumner, at p. 985.

² *Haynes v. Harwood* [1935] 1 K.B. 146.

³ The term ‘owner’ is used here to mean the person liable for *pauperies*.

⁴ Holmes, *Common Law*, p. 10.

the *actio de pauperie*, and not an action on the specific delict committed by the animal. If your monkey throws coconuts out of a window at me, I cannot sue you for *damnum iniuria datum*.⁵ Nor, if your chimpanzee pokes its tongue out at me, can I sue you for *iniuria*. Or rather, I cannot bring such actions if the animals do these acts without any wrong on your part. If, however, there is a wrong on your part causing the animal to harm me, then I can sue you for the appropriate delict.⁶

We shall return to the animals later. I have brought them in at this stage in order to explain that in Roman law it is not altogether absurd to speak of the act of an animal, and that the act of an animal may give rise to a liability separate from the liability of an owner for his own act.

A. 'NOVUS ACTUS INTERVENIENS' OF A HUMAN BEING

There are three questions in which the relevance of the *novus actus* must be considered :—

1. *Has the plaintiff a direct action under the Lex Aquilia?*

It is part of the almost forgotten lore of the English law of tort that there was once a very real distinction between trespass and case. The actions under the *Lex Aquilia* lay only for a direct act committed *corpore*, i.e., by the defendant's body. Under the later extensions of Aquilian liability the plaintiff could have an *actio in factum* or an *actio utilis* where the wrong was not inflicted directly by the defendant's body. The distinction is not unlike the English distinction between trespass and case.

What happens, then, if a human body intervenes? Professor Lawson has remarked⁷ that 'any Roman jurist would have enjoyed dealing with the problem raised in the *Squib Case*'.⁸ In that case A threw a lighted squib into a crowded market-house. B quickly picked it up and, to protect himself and a stall-holder's goods, threw it away; but it fell on C's stall and C quickly threw

⁵ D. 9, 2, 5, 2. But I could probably sue you in the action for *res deiectae vel effusae*.

⁶ See pp. 219–221, *post*. Perhaps you would be liable for *iniuria* if you set a dog on me in order to insult me, or if you could cause your monkey to make an insulting gesture at me. Could I sue you for *furtum* if you had trained your jackdaw or your monkey to steal at your bidding, and the bird or beast removed a ring from my room?

⁷ F. H. Lawson, *Negligence in the Civil Law* (1950), p. 24.

⁸ *Scott v. Shepherd* (1773) 2 Wm.Bl. 892.

it away for similar reasons; and then the squib burst and damaged D's eye. D sued A in trespass and succeeded.⁹ The emergency actions of B and C did not prevent A's act being direct.

The nearest parallel in Roman law is a case in which A pushed B against C so that C was hurt.¹⁰ It was held that the action against A was an *actio in factum* and not a direct action. The jurists were prepared to extend the defendant's body: (1) by means of a sword, a bludgeon or any other inanimate weapon,¹¹ even if the weapon was thrown¹²; (2) by means of a drug administered with the defendant's hands¹³; (3) if the defendant let fall an over-heavy load¹⁴; (4) possibly, even if the defendant incited an animal to do harm.¹⁵

In these cases the action was direct. But one human body could not be regarded as an extension of another human body so as to allow a direct action. In the case mentioned,¹⁶ the man who was pushed was absolved from liability. The reason given was '*quia damnum iniuria non dedit*'—he did not inflict unlawful loss; but this is set in a context in which the question discussed is the meaning of *iniuria*. There is no evidence whether the intervening act was voluntary or involuntary, or indeed whether it was an act at all.

In the *Squib Case*¹⁷ the acts of B and C were voluntary in the physiological sense that they intended to move their muscles and throw; but they were, perhaps, involuntary in a legal sense because B and C had no choice or the barest minimum of choice between the course they took and a safer course of action. In the legal sense it may be true to say that an involuntary act is one in which there is no choice, or no choice which in the circumstances would be appreciable by a reasonable doer of the act. If the acts of B and C in the *Squib Case* were involuntary in this sense the act of A, who first threw the squib, was a direct

⁹ If A hits a ball at cricket into the hands of B who fumbles the ball so that it passes to C, and so on until it is eventually caught by D before it touches the ground, the score-book will state 'A, caught D'.

¹⁰ D. 9, 2, 7, 3.

¹¹ D. 9, 2, 7, 1.

¹² D. 9, 2, 9, 4; 9, 2, 27, 6.

¹³ D. 9, 2, 9 pr. 1.

¹⁴ D. 9, 2, 7, 2. Cf. D. 9, 2, 27, 33 where the connection is even more slender. A carter was held liable to a direct action where stones fell from a cart, having been badly packed by him, and broke something.

¹⁵ See p. 221, *post*.

¹⁶ D. 9, 2, 7, 3.

¹⁷ *Vide supra*.

act because the intervening acts did not count. In the Roman Case¹⁸ a contrary decision was reached by Proculus, and supported by Ulpian, who, however, gave an *actio in factum*. There was no reference to the question whether the act of the man who was pushed was voluntary or involuntary. If it was voluntary, an *actio in factum* may still have been the appropriate action; thus, a midwife who gave a woman a drug to take herself was held liable in an *actio in factum*.¹⁹ But Roman law apparently did not deprive the involuntary act of a human being of its efficacy as an *act*. It might be an act for which the doer was not responsible in law, but it was still an act and therefore barred a direct action against the person who originally started the mischief.

How the Romans would have dealt with an all-in wrestler who hurled his opponent out of the ring and thus injured a spectator is a moot point.²⁰

2. *Is the plaintiff's action under Chapter I or under Chapter III of the 'Lex Aquilia'?*

This question could arise only if the plaintiff's slave or quadruped *pecus* was the victim of a wounding by one person, X, and died later after a further wounding by another person, Y.

It will be remembered that, by Chapter I, the defendant who killed²¹ the plaintiff's slave²² was liable to pay the highest value of the slave in the year before the killing. Chapter III provided a different penalty where the slave was wounded.²³ It was, therefore, important to discover, in the cases we are con-

¹⁸ D. 9, 2, 7, 3.

¹⁹ D. 9, 2, 9 pr. See, also, D. 9, 2, 7, 6.

²⁰ In D. 9, 2, 7, 7 it is the person thrown who is killed and the action is, of course, direct. In D. 9, 2, 52, 4, where a ball-player pushed a boy and the boy fell and broke his leg, there was no action because there was no *culpa*—it was an accident. The case at the end of D. 9, 2, 7, 4, of the slave killed *non in certamine*, is more in point, but is obscure and inconclusive; in particular, although a direct action is given to the slave's master, we do not know how the slave was killed. If the hurled opponent could be regarded as an inanimate weapon *pro tempore*, a direct action would lie, but then D. 9, 2, 9, 4 would be relevant. See, further, p. 219, *post*.

²¹ Of course *iniuria*.

²² We shall use only the slave as our example.

²³ The nature and extent of this penalty cannot be considered here. See H. F. Jolowicz, 'The original scope of the *Lex Aquilia* and the question of damages' (1922) 38 *Law Quarterly Review*, p. 220; D. Daube, 'On the Third Chapter of the *Lex Aquilia*' (1936) 52 *Law Quarterly Review*, p. 253; D. Daube, 'On the use of the term *Damnum*', *Studi Solazzi* (1948), p. 3.

sidering, who had wounded and who had killed. The answer to that question was relevant to (1) liability and (2) damages.

Liability. On this question we have three cases:—

D. 9, 2, 11, 3 — Ulpian

Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere periit, posteriorem teneri, quia occidit, quod et Marcello videtur et est probabilius.

X gives S a mortal wound. Later Y wounds S and deprives him of life. According to Celsus, Marcellus and Ulpian, X is liable only for wounding, because S died of Y's wound; but Y is liable for killing.

D. 9, 2, 15, 1 — Ulpian

Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere periit, quasi de occiso agi posse Iulianus ait. haec ita tam varie, quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiore non est passa ruina apparere an sit occisus.

X gives S a mortal wound. Later, through the fall of a house or shipwreck, or by some other blow, S dies sooner than he would have died from X's wound. The only question considered is whether X is liable for wounding or killing, although *alio ictu* suggests the possibility of a *coup de grâce* at the hand of a later assailant, Y. Ulpian, consistently with his view in D. 9, 2, 11, 3, holds X liable for wounding, and not for killing. But he also appears to approve a view of Julian that, if X wounds S, and then S's master, M, manumits S or alienates him to P, and later S dies from the wound, X can be sued for killing. The same act of X cannot, for an action under the *Lex Aquilia*, be both a wounding and a killing,²⁴ and, therefore, a distinction is drawn between the two cases: (1) where S was manumitted or sold by M, the fact that X had killed him could only be proved when S in fact died,²⁵ and (2) where S died through the fall of a

²⁴ Different acts of the same person can be a wounding and a killing. See D. 9, 2, 32, 1.

²⁵ At that time S was no longer M's slave. If the killing was held to take place at the date of the wounding, only M could bring the action, because he was S's master at that time. Obviously S could not sue for killing if he was manumitted and then died. If he was sold to P, P could not sue if the date of the wound was the date of the killing.

house it could not be proved at all whether X had killed him.

In other words, the plaintiff cannot prove that X had killed S, where there was an intervening event which made it doubtful whether X really had killed him. The only example given of such an event in this connection is the fall of a house. Suppose, however, that '*alio ictu*' in the earlier part of the fragment does mean that the intervening event can be a wounding by Y. Y's act would still make it doubtful whether X had killed S, and therefore X would be liable only for wounding. On the other hand, Y's *coup de grâce* would make Y liable for killing. There is no conflict here with D. 9, 2, 11, 3.

D. 9, 2, 51 pr. — Julian

Ita vulneratus est servus ut eo ictu certum esset moriturum : medio deinde tempore heres institutus est et postea ab alio ictus decessit : quaero an cum utroque de occiso lege Aquilia agi possit. respondit : occidisse dicitur vulgo quidem qui mortis causam quolibet modo prae-buit : sed lege Aquilia is demum teneri visus est qui adhibita vi et quasi manu causam mortis prae-buisset, tracta videlicet interpretatione vocis a caedendo et a caede. rursus Aquilia lege teneri existimati sunt non solum qui ita vulnerassent ut confestim vita privarent, sed etiam hi quorum ex vulnere certum esset aliquem vita excessurum. igitur si quis servo mortiferum vulnus infligerit eundemque alius ex intervallo ita percusserit, ut maturius interficeretur quam ex priore vulnere moriturus fuerat, statuendum est utrumque eorum lege Aquilia teneri.

X wounds S so severely that it is certain that S will die from that wound. Later Y despatches S by another blow. Julian says that a man is liable for killing not only if his blow kills his victim immediately, but also if he inflicts a wound of which it is certain that his victim will die. It is important to note the stress laid on the certainty that S will die from X's wound.²⁶ That was the case which was being discussed. If it was certain that S would die from X's wound, it was certain that X had killed S, and therefore X was liable for killing. It was equally certain that Y had finally dispatched S, and therefore Y also was liable for killing.

So far, there is no real conflict between the rules laid down in these fragments. But, at the end of D. 9, 2, 51 pr., it is said that if X gives S a mortal wound, and later Y wounds S, so that S dies earlier than he would have died of X's wound, both

²⁶ See Voet, *Commentary on the Pandects*, 9, 2, 9.

X and Y are liable under the *Lex Aquilia*.²⁷ The facts look very similar to those in D. 9, 2, 15, 1, except that here, instead of the vague words '*alio ictu*' to indicate the intervening event, it is stated expressly that a person has given the later blow. In both cases this later blow causes S to die sooner. In neither case is it said that S would be certain to die of X's blow. In both cases the same word is used to describe the first wound, viz., '*mortifer*'.²⁸ But the solution reached is different because in 15, 1 X is not liable, and in 51 pr. X is liable for killing.

Many attempts have been made to reconcile these passages²⁹; but is reconciliation so difficult? For convenience we have translated the word '*mortifer*' so far as 'mortal'. Every context in which it is used shows that it means simply 'death-carrying', i.e., potentially fatal; but the death need not occur immediately.³⁰ If it had occurred immediately, X's wound would have raised no problem. Until it has occurred, the plaintiff cannot bring his action for killing. '*Mortifer*', moreover, is an equivocal word because, while all severe wounds are potentially fatal, not every wound in fact results in death. In the case we have considered, Y's wound clearly did result in S's death, and Y was therefore liable for killing. If the plaintiff seeks to make X liable, however, he must be able to prove with equal certainty that X's wound was not potentially but actually fatal. The texts we have discussed show two, perhaps three, possibilities:—

(1) X's wound was so severe that it was certain that it would cause death. X is liable for killing. The last part of 51 pr. must be read in the context of what goes before. It is the earlier part of the fragment which gives *mortiferum vulnus* the meaning of a 'fatal' wound, and not merely a 'potentially fatal' wound.

(2) Y's wound was so severe that it prevented all proof of the character of X's wound. If the words *alio ictu* in 15, 1 refer to a blow by Y, that blow may have been thought by Ulpian to be as obliterative in its effects as the fall of a house or a shipwreck.

(3) The mere fact that Y's wound produced a fatal result was

²⁷ The context, and particularly D. 9, 2, 51, 2, shows that both are liable for killing.

²⁸ In 15, 1—*vulneratus mortifere*; in 51 pr.—*mortiferum vulnus*.

²⁹ See, e.g., Voet, *Commentary on the Pandects*, 9, 2, 9; Pernice, *Die Lehre der Sachbeschädigungen* (1867), p. 179 et seq.; Lawson, *op. cit.*, at pp. 50–53.

³⁰ See, e.g., D. 9, 2, 21, 1: *quod si mortifere fuerit vulneratus et postea post longum intervallum mortuus sit*.

sufficient to cast a doubt upon X's liability for killing, and so to create a presumption that X's wound was not fatal. This is another possible interpretation of 15, 1 and may also have been stated as a general rule in 11, 3. The presumption could be rebutted by proof that X's wound was fatal, as in 51 pr.

Professor Lawson, however, puts forward the view that the general rule is contained in 51 pr. and that the exception is in 15, 1.³¹ This view is based partly on the idea that the Romans had a theory of causation and partly on D. 9, 2, 51, 1. We shall reserve the former point till later.

D. 9, 2, 51, 1 — Julian

Idque est consequens auctoritati veterum, qui, cum a pluribus idem servus ita vulneratus est ut non appareret cuius ictu periisset, omnes lege Aquilia teneri iudicaverunt.

After reaching the decision in the final part of 51 pr., Julian said that it was consistent with the view of the *veteres*, who held that where a slave was wounded by several persons, and it did not appear by whose blow he had died, all were liable under the *Lex Aquilia*. However, as Lawson points out,³² 51, 1 deals with the case of 'many contributing simultaneously to a death'. It is obvious that the story of 51 pr. is continued in 51, 2 which, as we shall see, deals with the amount of damages. It is submitted that 51, 1 was sandwiched between these two fragments by the compilers as a result of a misunderstanding of Julian's decision on the facts before him. Those facts involved consecutive acts of two independent wrongdoers, and not simultaneous acts of wrongdoers who probably acted in concert. Julian's decision, therefore, was in no sense analogous to the other case in principle. Indeed, whereas in 51, 1 it was not certain who had struck the fatal blow, in 51 pr. it was perfectly clear who had struck both fatal blows.

It is suggested, therefore, that the Romans divided wounds into: those which were potentially fatal (*mortifera*), and those which were not potentially fatal.⁰ There was obviously no liability for killing unless death did in fact result. Even if death did result, there was no liability for killing unless it could be

³¹ Lawson, *op. cit.*, pp. 51-52.

³² See, also, D. 9, 2, 11, 2, where Ulpian refers to this statement of Julian.

⁰ There was a parallel classification in the Talmud. Wounds were assessed for compensation according to whether they were potentially fatal or not. Talmud, *Sanhedrin*, 78b.

proved with tolerable certainty that the death resulted from the act of the particular defendant who was sued. Whether the wound was potentially fatal or not, an action could lie for killing if death resulted.³³

In two texts, the question of intervening neglect of a wound is raised.

D. 9, 2, 30, 4 — Paulus

Si vulneratus fuerit servus non mortifere, neglegentia autem perierit, de vulnerato actio erit, non de occiso.

S is wounded by X *non mortifere*, and then dies from neglect. X is liable for wounding, but not for killing. It is not clear whose neglect caused the death, but the relevant point for our purposes is that X did not cause the death and therefore was not liable for killing.³⁴

D. 9, 2, 52 pr. — Alfenus

Si ex plagis servus mortuus esset neque id medici inscientia aut domini neglegentia accidisset, recte de iniuria occiso eo agitur.

X beats S so that S later dies. The death was not due to the ignorance of a doctor or the neglect of S's master. X is liable for killing. On this passage, Mr. Justice Van den Heever comments³⁵: 'I think an immense amount of learning has been wasted on this fragment'. I entirely agree. There is nothing in this text to suggest that, if the intervening act was culpable, X would have ceased to be liable altogether or would have been liable only for wounding. The remaining extracts from the works of Alfenus in D. 9, 2, 52 suggest that he was primarily concerned with the question whether there was any *culpa* at all in the doctor or master.³⁶ If there had been *culpa*, at most it may possibly have cast doubt on X's liability for killing³⁷; but, since there was no intervening *culpa* to raise that doubt, X was liable.

³³ See D. 9, 2, 7, 5, where a person who lightly struck a sick slave so that he died was held liable for killing, '*quia aliud alii mortiferum esse solet*'. Here, however, *mortiferum* must mean either actually fatal or potentially fatal by reason of the special circumstances.

³⁴ Probably X's wound was unlikely to cause death at all, but someone's subsequent neglect may have raised a doubt as to X's liability as in D. 9, 2, 15, 1. See pp. 201–202, *ante*.

³⁵ F. P. Van den Heever, *Aquilian Damages in South African Law*, (1944) Vol. 1, p. 101.

³⁶ K. Visky, 'La responsabilité dans le droit romain à la fin de la République' (1949) 3 *Revue Internationale des Droits de l'Antiquité*, p. 437, at pp. 450–458.

³⁷ As in D. 9, 2, 15, 1. See pp. 201–202, *ante*.

After discussing the first three cases which we have considered, Professor Lawson wrote³⁸: 'What clearly emerges from the discussion is that the Romans had a firm grasp of the significance of an interruption in the chain of causation, though they had the same difficulty as every one else of deciding whether it had taken place in particular cases'.³⁹

It is submitted that the Romans were never concerned with any more intricate question than the question, whether the plaintiff could prove with tolerable certainty that the particular defendant X had done the act for which he was being sued. The fact that another person, Y, had also done a similar act which would render him liable for killing the plaintiff's slave was relevant only in so far as it made it less certain that X had done the killing.

Damages. Of course, the decision whether the defendant is liable under Chapter I or under Chapter III of the *Lex Aquilia* is also relevant to the amount of damages, or rather penalty, which he will have to pay. But, if the defendant is liable for killing under Chapter I, the important question is: 'When did the killing take place?' The value of the dead slave is his highest value within the year before the date when he was killed.⁴⁰ Celsus had held the date of killing to be the date of the death.⁴¹ But the view of Julian, frequently repeated and adopted, was that the date of killing is the date of the wound.⁴²

If X wounded S once and was sued for the wounding, he could be sued again for the killing if S later died of that wound.⁴³ But Julian held that in the second action X could plead an *exceptio doli*, to prevent S's master recovering more in both actions, than he would have recovered if he had waited till S died and sued only for the killing.⁴⁴ In other words, there was only one killing.

Gaius gives us a case in which X wounds S and later kills him.⁴⁵ X has committed two delicts and can be sued for both. He is liable for one wounding and one killing, and not for two

³⁸ Lawson, *op. cit.*, at p. 53.

³⁹ See, also, Lawson, *op. cit.*, at p. 130, note to D. 9, 2, 52 pr.

⁴⁰ D. 9, 2, 21, 1.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ D. 9, 2, 46.

⁴⁴ D. 9, 2, 47.

⁴⁵ D. 9, 2, 32, 1.

killings. We must suppose that the first wound was not one which would certainly cause death. But suppose the first wound had been so severe that it was certain that S would die, and then X had gone away. Then later X returned and found S still alive, and dispatched him. Would Julian have held that there were two killings—one at the time of the first wound and one at the time of the second? To be consistent with Gaius and with his own view in 51 pr., he would have had to reach that decision. Each fatal wound would be a completed delict of killing.⁴⁶

However, we are concerned with a *novus actus*. The decision in 51 pr. is brought to its conclusion in 51,2. The full facts of the case are these: X wounds S so severely that it is certain that S will die from that wound. Then T institutes S as his *heres*. Later Y dispatches S by another blow. X and Y are each held liable for killing. But the highest value of S for X is that estimated in the 365 days before the date of X's wound. The highest value for Y is that value in the 365 days before the date of Y's *coup de grâce*. Between these two dates S's value has risen by the value of T's *hereditas*. It is stated quite clearly by Julian that X and Y are each understood to have killed S in different circumstances and at different times. There is no question of any interruption in a chain of causation. There are two causes—X's wound and Y's wound. Both X and Y are liable, even if the result is that the plaintiff recovers two complete amounts of full damages.

3. *Is the defendant's liability excluded or limited by a 'novus actus interveniens'?*

In the cases we have considered so far there is no express trace of anything like our modern English ideas of *novus actus interveniens*, in relation to either liability or remoteness of damage. We must now consider other cases in which these questions may possibly have been considered more directly.

(1) '*Novus actus*' of a third party

D. 9, 2, 11 pr. — Ulpian

Item Mela scribit, si, cum pila quidam luderent, vehementius quis pila percussa in tonsoris manus eam deiecerit et sic servi, quem tonsor habebat, gula sit praecisa adiecto cultello: in quocumque

⁴⁶ Cf. D. 9, 2, 48—a case of two separate acts of damage.

eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam: et sane si ibi tondebat ubi ex consuetudine ludebatur vel ubi transitus frequens erat, est quod ei imputetur: quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere.

Some people are playing ball. Somewhere, within what appears to be the danger-area of the ball game, Y has set up a barber's chair and is shaving S, M's slave. One of the ball-players, X, hits a ball too hard; the ball strikes the barber's hand; the barber's razor cuts the slave's throat; and M wants to know whether, and whom, he can sue for the slave's death. Mela wrote that whichever of them (X or Y) was guilty of *culpa*, was liable under the *Lex Aquilia*.⁴⁷ The text is mainly concerned with the *culpa* of the barber and of the slave—a point to which we shall return in another connection.

The liability of X, the ball-player, was considered by the jurists; but it could not have been considered as an alternative to that of Y, the barber, in spite of the ambiguity of *in quocumque eorum culpa sit*.⁴⁸ Unfortunately we are not told what decision the jurists reached about X's liability. That does not mean that his liability can be ruled out on the ground that Y's *culpa*, if proved, would exclude X's liability. Proof of Y's *culpa* would make Y liable, but X could still be liable for his own act.

D. 9, 2, 27, 9 — Ulpian

Ceterum si alius ignem subiecerit fornaci, alius neglegenter custodierit, an tenebitur qui subiecerit? nam qui custodit nihil fecit, qui recte ignem subiecit non peccavit: quid ergo est? puto utilem competere actionem tam in eum qui ad fornacem obdormivit quam in eum qui neglegenter custodit, nec quisquam dixerit in eo qui obdormivit rem eum humanam et naturalem passum, cum deberet vel ignem extinguere vel ita munire ne evagetur.

X, a stoker, lights the fire in the furnace of a country-house. Y guards it negligently. The fire breaks out and the house is

⁴⁷ The action was a direct action in both cases. Pollock suggested that Mela was primarily concerned with the question whether the action was direct or *in factum*. See Pollock, *Law of Tort* (13th ed. 1929), App.D. There could have been no doubt in Y's case because the wound was inflicted by an instrument in his hand, if Y was liable at all. The question of a direct action was relevant only to X's liability because it might have been thought that there was no direct contact between X and S.

⁴⁸ Lawson, *op. cit.*, p. 89. Kunkel is wrong in suggesting that the problem considered by Ulpian was 'X or Y?'; see Kunkel (1929) 49 *Z.S.S.*, pp. 177-178.

burned down. It is impossible, in this lecture, to consider all the implications of this difficult passage, which also appears in the *Collatio* in a somewhat different form.⁴⁹ It is fairly clear from the *Digest* version that an *actio utilis* was given against both X and Y; both were culpable. *Prima facie* the same result seems to follow from the *Collatio* version. But it is arguable that Ulpian absolved X from liability altogether, and considered only the question of Y's liability. That conclusion, however, need not rest on the fact that Y's negligence was a *novus actus* which excluded X's liability. X may have been absolved simply because there was nothing culpable in lighting a fire at all.

There is a more interesting question in a comparable case in the *Collatio* version. The direct action is said not to lie where a surgeon operates faultlessly on a slave, but when either the surgeon himself or someone else is negligent in the after-care of the slave. Then Ulpian gives an *actio utilis* against a surgeon who is negligent in after-care, but tantalises us by not saying whether he would give an *actio utilis* against the surgeon if someone else was negligent in the after-care.⁵⁰ We can assume that the negligent other person would be liable for his own delict.⁵¹

(2) 'Novus actus' of the plaintiff⁵²

In the cases we have discussed in A. 2 *supra*, X and Y could each be liable for the wrong which each had done to M, the

⁴⁹ *Collatio*, 12, 7, 7.

⁵⁰ It is tempting to say that he intended to do so. Perhaps the fact that a surgeon performed an operation made it *culpa* in him if he failed to ensure that other people looking after the patient, as well as he himself, were careful in after-treatment. There is nothing which points definitely to a similar obligation on a stoker who lit a fire, so as to make him liable for the neglect of one who was left to guard the fire.

⁵¹ Even for a culpable omission after he had assumed the responsibility of after-care.

⁵² It is not intended to discuss here whether Roman law recognised anything like the English doctrine of contributory negligence. Holdsworth thought that something like it existed in Roman law. He added: 'In a system of law which grounded liability upon negligence, it was a natural and a logical doctrine'. See Holdsworth, *History of English Law*, Vol. 8, at p. 459. Whether liability for the Aquilian delicts was grounded on negligence depends on what is meant by negligence. See W. W. Buckland, 'The duty to take care' (1935) 51 *Law Quarterly Review*, at p. 638. On the question of the nature of contributory negligence, the following passage, written by a learned South African writer, is noteworthy. 'Aquarius', 'Causation and legal responsibility' (1945) 62 *South African Law Journal*, p. 126, at p. 133: 'Contributory neg-

master of S. Logically, therefore, if Y himself was the master of S, while Y could not be liable to himself, there was nothing to exclude X's liability to Y. That seems to be the view adopted in D. 9, 2, 30, 4.⁵³ It is not clear whose was the intervening neglect; but if it was the neglect of the slave's owner, X was still liable to him for wounding, though in the circumstances not for killing.⁵⁴ Nor can any different view be gathered from D. 9, 2, 52 pr. Even if Y had been negligent, there was nothing which excluded X's liability.⁵⁵

The problem was raised in a different form in several texts where the person injured was indifferent to consequences which proved harmful to himself. They are not all strictly cases of *novus actus*, but they require consideration. For the sake of argument, we shall assume that S is both the plaintiff and the person injured by X.⁵⁶

D. 9, 2, 9, 4. 10 — Ulpian, Paulus⁵⁷

Sed si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est: sed si cum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere, qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur: nam lusus quoque noxius in culpa est.

S crosses a field where men are throwing javelins. Suppose that S was injured by a javelin. X, the thrower, was liable if he aimed at S deliberately, or near enough to make S jump,⁵⁸ or perhaps if he recklessly persisted in throwing after he knew that S was in the danger-area.⁵⁹ In these three cases⁶⁰ X knew of S's presence and was culpable. Apart from these cases X was

ligence differs from ordinary negligence in one very important respect. It does not necessarily consist in wrongful indifference to those consequences of the actor's conduct which may be harmful to himself . . . and it can occur consciously or inadvertently. The same may, of course, be both a breach of a duty of care owed by the actor to another and a culpable exposure of himself or his property to the risk of harm'.

⁵³ See p. 205, *ante*.

⁵⁴ See, however, Lawson, *op. cit.*, at p. 116. He takes this fragment as excluding X's liability if there had been contributory negligence on the part of Y; but the point is that X had not killed the slave at all, and so could only be liable for wounding.

⁵⁵ Unless it could be said that the case fell within the principle of D. 9, 2, 15, 1. See pp. 201-202, *ante*.

⁵⁶ But these are not the facts in the cases cited; and there could be no action under the *Lex Aquilia* for the death of a freeman.

⁵⁷ Cf. Inst. 4, 3, 4.

⁵⁸ Grueber, *The Lex Aquilia* (1886), at pp. 31-32.

⁵⁹ Pollock, *op. cit.*

⁶⁰ They are all interpretations of 'data opera' in the light of the context.

not liable. The reason given was that S ought not to have crossed the javelin field at an improper time.

This reason appears entirely out of the blue and is suspect. The fragment is in the middle of other fragments dealing with the availability of the direct action or of an *actio in factum*. The reason is not repeated in the Institutes, where the example is given in relation to the question whether soldiers practising with javelins on the parade ground are liable for *culpa*. That may be the real answer—that men throwing javelins on a javelin field do not expect strangers to cross the field and, therefore, are not normally culpable at all if one happens to cross and is hit. But the moment they are aware that he is crossing, their awareness is a new factor in the situation, creating liability for *culpa*.⁶¹ If that view is correct, the javelin throwers who were unaware of S's crossing were exempted from liability, not because of S's *novus actus* but because of their own absence of *culpa*.

D. 9, 2, 11 pr. — Ulpian⁶²

The main question raised in this fragment was the liability of the barber. The fragment concluded with the statement that a person who entrusts himself to a barber who sets his chair in a dangerous place has himself to blame. That could have any of three meanings:—

(a) The barber was not guilty of *culpa* at all. Proculus thought he was culpable. Ulpian may have made the barber's liability for *culpa* depend on the circumstances⁶³; but it is equally possible that he gave alternative reasons for the barber's *culpa*. The barber could not be compared with the javelin thrower who was unaware of the presence of a stranger on the javelin field: he knew that his customer was there. But when did the barber's *culpa* begin? *Culpa* does not exist in a vacuum. It is a condition of culpability in one person in relation to another person. The barber's *culpa* began, therefore, not when he set up his chair in the danger area, but only when he began to shave his customer on that chair. It cannot be said that at that identical moment the barber's *culpa* began and also ceased.

(b) The barber was guilty of *culpa*, but the customer's con-

⁶¹ Cf. D. 9, 2, 3, 21 pr., where a similar principle is applied in the case of a tree-pruner throwing down branches from a tree.

⁶² See p. 207, *ante*.

⁶³ See Kunkel (1929) 49 *Z.S.S.*, at p. 178.

duct precluded him from suing the barber. I have deliberately used the indefinite word 'conduct' because it seems as incongruous to speak of the customer's *culpa* as it is to speak of his contributory negligence in English law. The barber could have had no action under the *Lex Aquilia* against his customer on the ground of the latter's *culpa*. It may, therefore, be inappropriate to apply the maxim of Pomponius⁶⁴: *Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire*. The loss that a man suffers through his own *culpa* is deemed to be no loss at all.

The customer's conduct, therefore, consisted simply in exposing himself voluntarily to the risk of being shaved in a dangerous place. If the Romans had thought of the maxim '*volenti non fit iniuria*' they might have applied it here. But there is no indication that the customer's self-inflicted risk was a *novus actus interveniens*. Indeed, if he assumed the risk at the time he sat in the chair, and the barber's *culpa* began when he started shaving, the customer's assumption of risk could not be said to have intervened.

(c) Both the barber's *culpa* and the customer's conduct were concurrent causes. Even if the customer had assumed the risk, ought we to say that the barber is completely absolved from liability? If he cut his customer's throat because he had his eye on the ball game and not on his own razor, could he have said, 'I am very sorry, but after all you did accept the risk of being shaved in this place'? If we do not rule out the barber's responsibility altogether, we can weigh the relative culpability of both cases in order to determine the liability for the ultimate accident.⁶⁵ The cases which we have discussed, concerning wounding by one person and final killing by another person, show that the Romans were not unaware of the method of balancing causes where there was an interval of time between them. Later commentators on 11 pr. show that they sensed the use of the same method where the causes were concurrent.⁶⁶ But if the causes

⁶⁴ D. 50, 17, 203. See, however, 'Aquarius', 'Causation and Legal Responsibility' (1941) 58 *South African Law Journal*, at p. 247: '*Culpa sua* is any carelessness in safeguarding his own person or property'.

⁶⁵ See 'Aquarius', 'Causation and Legal Responsibility' (1945) 62 *South African Law Journal*, p. 126, at p. 135.

⁶⁶ See, e.g., a scholion to the *Basilica*, Heimbach, 5, 11, 3; Voet, *Commentary on the Pandects*, 9, 2, 17; Kunkel (1929) 49 *Z.S.S.*, at p. 178, quoting Beseler.

are concurrent there is again no question of an intervening act.

In both the 'javelin case' and the 'barber case' we have assumed that the person injured was the plaintiff. In fact, however, the person injured was a slave and the plaintiff was his master. It was the master who suffered the loss, and there was clearly no question of *culpa* on his part.

D. 9, 2, 28 pr. 1 — Paulus

Qui foveas ursorum cervorumque capiendorum causa faciunt, si in itineribus fecerunt eoque aliquid decidit factumque deterius est, lege Aquilia obligati sunt : at si in aliis locis ubi fieri solent fecerunt, nihil tenentur.

Haec tamen actio ex causa danda est, id est si neque denuntiatum est neque scierit aut providere potuerit : et multa huiusmodi deprehenduntur quibus summovetur petitor, si evitare periculum poterit :

X sets a pit to catch animals. Y, or Y's property, falls into the pit and is injured. X is liable unless (1) he made the pit in a place where pits are usually made ; or (2) if he made the pit in an unusual place, *either* he gave warning *or* Y knew or could foresee the danger.

The fragment ends by saying that there were many similar cases in which the plaintiff would lose his action if he could have avoided the danger.⁶⁷ It must be noted that *prima facie* the pit-maker was liable for setting a trap in a place of public passage.⁶⁸ A trap, however, ceased to be a trap, so far as the plaintiff was concerned, in the three cases stated. There was no question in these cases of the *culpa* of the plaintiff, or of a *novus actus* of the plaintiff. The defendant could escape liability by digging his pit in a usual place, or by warning of its existence in an unusual place.⁶⁹ His *culpa* ceased when the plaintiff knew or could foresee the danger.⁷⁰ The same result would

⁶⁷ Cf. D. 9, 2, 31 pr., where failure to foresee or warn is stated to be *culpa*.

⁶⁸ Cf. Exodus xxi. 33, 34 ; Mishnah, *Baba Kamma*, 5, 5, 6.

⁶⁹ How would the Romans have dealt with *Clayards v. Dethick* [1924] A.C. 406, at p. 419? X made a pit in the street. Y, reasonably exercising his rights, led his horses across the pit. Y knew of the danger, but X was held liable because he ought to have foreseen the action taken by Y.

⁷⁰ The whole of D. 9, 2, 28 pr. — 29 pr. is odd. *Inter alia*, the action is said to be *ex causa*, a phrase which normally suggests that the magistrate holds an inquiry before granting the action. Why he should do so here it is difficult to say, unless perhaps the magistrate in question was an aedile and the pit was made in a public thoroughfare over which the aedile had jurisdiction. Lawson, *op. cit.*, at p. 111, suggests that 'the praetor granted a formula *in factum concepta*, but insisted on its including an allegation that there had been no warning, etc.'

probably not have been reached if the defendant had been guilty of *dolus*, e.g., if he had deliberately set the trap for Y.⁷¹ If that is so, it is clear that X's liability has nothing to do with the fact that he caused the damage to Y.

Indeed, in every case which we have discussed under A. 3, the question which was considered was the relative culpability of the parties in question, and not the extent to which each was a cause of the loss suffered. Causation may have been relevant to the question whether a man was liable to a direct action or to an *actio in factum*, or, possibly, to the question whether he was liable for wounding or for killing; but on the issue whether he was liable at all, the only relevant inquiry was into the existence of his culpability. If, therefore, the *novus actus* of a third party or of the plaintiff intervened between the defendant's act and the *damnum*, neither the *novus actus* nor the defendant's act was ruled out as a cause of the *damnum*. It was tacitly assumed that the *damnum* was caused by both acts. The only problem which remained was to weigh the culpability of the two acts and to see who was the more culpable.

Even at the risk of incurring Professor Goodhart's scorn for the use of metaphors, I shall make use of the not altogether inappropriate scales of justice.

M is suing X for *damnum iniuria datum*. If X alleges that M's conduct was culpable, then M and X go into separate pans of the scales. If X's conduct was more culpable, it weighs down his pan and M is on top—he wins his action. If M's conduct is more culpable, then his pan drops and X is on top—M's action fails. It may be answered that, in the 'javelin case' and the 'barber case', M was suing X for the killing of M's slave, S. So it is S, and not M, who goes into the pan opposite X. That is true; but I think we must assume that M in these cases was identified with persons for whom he was responsible in delict,⁷² so that M was directly affected by whatever happened to S in the weighing.

Now suppose that M sues X, and X sets up a *novus actus* of Y. In this case M is entirely an onlooker and, if our judgment of the texts is correct, he need not even bother to look in order

⁷¹ See D. 9, 2, 9, 4; 'Aquarius' (1945) 62 *South African Law Journal*, at p. 143; Lawson, *op. cit.*, at p. 55.

⁷² Of course, this does not mean that S had necessarily committed a delict.

to decide which party to sue. If X and Y go into the pans of the scales, there is nothing in Roman law which shows that either of them is relieved from liability if his pan comes out on top.

The reason for this lies in the penal nature of Aquilian actions. The purpose of the action was not merely to compensate the plaintiff but to punish the defendant.⁷³ The plaintiff could recover the full amount from each person held liable to him, even though the result was to multiply the loss which he actually suffered.⁷⁴ There was no question of contribution or indemnity between tortfeasors, whether joint tortfeasors or several concurrent tortfeasors.⁷⁵ There was no question of apportionment of loss between the plaintiff and the defendant where the plaintiff was also culpable. Although the Romans were probably not oblivious to the question of remoteness of damage,⁷⁶ the intervention of a *novus actus* did not, as far as we know, diminish the extent of the defendant's liability under the *Lex Aquilia*, once it had been decided that he was liable for either killing or *damnum*.

In English law the factors which contributed to the development of *novus actus interveniens* may have been: (1) the absence of rules allowing contribution and indemnity between joint tortfeasors⁷⁷; (2) the absence of rules allowing apportionment in cases where the plaintiff is culpable⁷⁸; and (3) the attempt to establish the 'mechanical direct-consequence' test instead of the 'reasonable foreseeability' test as the rule for estimating remoteness of damage.⁷⁹

⁷³ Even in Justinian's law, although the idea of compensation had been fully developed through the notion of the plaintiff's *interesse*, the action is called mixed, *i.e.* both penal and compensatory. Inst. 4, 6, 19.

⁷⁴ D. 9, 2, 11, 2. 4. See Sohm, *Institutes of Roman Law* (3rd ed. tr. Ledlie), at p. 362; I. Van Zyl Steyn, 'Contribution between tortfeasors' (1926) 43 *South African Law Journal*, p. 251, at p. 252; Ernst J. Cohn, 'Joint Wrongdoers in Continental Laws' (1935) 51 *Law Quarterly Review*, p. 468, at pp. 471, 493; 'Aquarius' (1945) 62 *South African Law Journal*, at p. 142.

⁷⁵ For the distinction, see Glanville L. Williams, *Joint Torts and Contributory Negligence* (1951), Chap. 1.

⁷⁶ Questions on the extent of the plaintiff's *interesse* are in point. See, also, D. 9, 2, 29, 3. 7.

⁷⁷ See Glanville L. Williams, 'The Law Reform (Contributory Negligence) Act, 1945' (1946) 9 *Modern Law Review*, p. 105, at pp. 117-118.

⁷⁸ *Ibid.* But see A. L. Goodhart, 'The "Last Opportunity" rule' (1949) 65 *Law Quarterly Review*, p. 237.

⁷⁹ See A. L. Goodhart, 'The Third Man or *Novus Actus Interveniens*', at pp. 193-195, *ante*.

All these factors led to the adoption of a doctrine of causation which it is the current fashion to deride.⁸⁰ All these factors existed also in Roman law, but Roman law had no general rule that a *novus actus interveniens* automatically excluded the defendant's liability altogether or reduced his damages. The only possible effects of the intervening act were (1) to substitute an *actio in factum* for a direct action, (2) to make the defendant, in some cases, liable under Chapter III and not under Chapter I, and (3) to provide a factor which had to be measured for culpability against the wrongful act of the defendant.

On the question whether the action was direct or not, the test applied, though not always uniformly, was whether the death or a damage to property was the result of a physical contact with the defendant's body, or such extensions of the defendant's body as we have mentioned.

It is submitted that the question, under which Chapter of the *Lex Aquilia* the defendant was liable, was a mixed question where a *novus actus* intervened. It was not only a question of causation. The second actor was liable for killing. But the liability of the first actor for killing depended on the plaintiff's ability to prove with reasonable certainty that his act was a cause of the death. That depended in turn upon the balance of probabilities ascertained by human experience—or, in modern language, the test of the 'reasonable man'.

In the third class of cases there is nothing to show that the *novus actus* of a third party exonerated the defendant from liability, and it is unlikely that it did so. But the *novus actus* of the plaintiff, or of someone who could be identified with the plaintiff, had to be measured for culpability against the defendant's wrongful act. Here, too, in modern language, the test of the 'reasonable man' might be expected to be applied.

Professor Goodhart has said⁸¹: 'The liability of the defendant depends on whether or not he could reasonably have foreseen the consequences, including the acts of third persons, and should have guarded against them'. There is only one case under the *Lex Aquilia* in which the test of foreseeability was expressly applied to the defendant's liability—the case of the tree-

⁸⁰ See A. L. Goodhart (1949) 65 *Law Quarterly Review*, pp. 137, 237; 'Aquarius', articles cited *supra*.

⁸¹ See p. 192, *ante*.

pruner who throws down branches from a tree.⁸² There is also one case in which the same test was applied to the plaintiff's conduct—the case of the man who walked into the bear-trap.⁸³ In both cases the fragments are suspected of interpolation.⁸⁴ To modern eyes it may seem odd that so important a principle as the test of foreseeability should not have appeared more frequently in the texts. That does not mean, however, that it was not applied in practice.

Let me conclude this part of my lecture with two quotations—one from Buckland and one from Holmes. Buckland wrote⁸⁵: 'To hold that lawyers never spoke of *diligentia* in their *responsa* and their books when they were freely speaking of it in their everyday life is impossible. . . . They use the word to mean not a state of mind but conduct which usually accompanies a certain state of mind as, indeed, it has been used in all ages'. Previously Holmes had written⁸⁶: 'The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or other circumstances'.⁸⁷

The phrase 'the foresight of a reasonable man' seems to put an unidentifiable person, of whose conduct we have no statistical records, into the position of a seer or a crystal-gazer. It is nothing more than a convenient formula for expressing the sum total of real human experience. The Romans were pre-eminently realistic

⁸² D. 9, 2, 31 pr.: '*culpam autem esse quod cum a diligente provideri poterit*'. The words are attributed to Mucius but they are believed to be interpolated. It is probable that the idea of *culpa* may have been recognised even by the Republican jurists. See Visky, *loc. cit.*, 437, and on this fragment at pp. 447–448.

⁸³ D. 9, 2, 28, 1. It is noteworthy that similar phrases are used in both passages. In 28, 1: '*id est si neque denuntiatur est neque scierit aut providere potuerit*' and '*si evitare periculum poterit*'. In 31 pr.: '*non esset provisum aut tum denuntiatur esset, cum periculum evitare non possit*'.

⁸⁴ Arangio-Ruiz says that the idea is gaining ground that the notion of foreseeability and the equation of *culpa* with negligence did not appear until the law of Justinian. V. Arangio-Ruiz, *Istituzioni* (10th ed. 1949), at p. 376.

⁸⁵ W. W. Buckland, *Diligens paterfamilias*, *Studi Bonfante* (1930), Vol. 2, p. 87, at p. 102.

⁸⁶ Holmes, *Common Law*, at p. 110.

⁸⁷ See, also, *ibid.*, at p. 112: 'From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions'.

in their outlook, and any question of culpability was tested in the light of the known human experience of their time. If, then, we find discrepancies between their views of what was reasonable and our own views, we must blame not the Roman mind, but the fact that there have been some changes in human experience since the days of the Roman jurists.

B. 'NOVUS ACTUS INTERVENIENS' OF AN ANIMAL

At the beginning of this lecture I said that in Roman law it was not absurd to refer to the act of an animal. It is even less absurd to do so today, when we have learned more about the mental processes of animals and even of their methods of communication. An act of any animate being is the result of a stimulus applied to the afferent nerves leading to the brain, which in turn sends out a message through the efferent nerves resulting in a muscular movement.⁸⁸ That process is common to men and animals, but there is a distinction in the mental part of this process. I may like to think that my dog Rover, which carries my parcels home for me, is intelligent, or that the chimpanzee at the Zoo, piling up boxes to get at a bunch of bananas, is very clever. But the mental processes of animals operate on a somewhat lower level than those of men; and even today man's knowledge of the mind of an animal is attained mainly by observing the animal's behaviour, and largely by imputing to the animal the experience of men.

The Romans, even less aware of the mental processes of animals than we are today, were not averse to attributing states of mind to an animal, even though they repeatedly said that animals lacked sense. Thus bees could have an *animus revertendi*: but Gaius had to deduce that state of mind from their behaviour—the *consuetudo revertendi*.⁸⁹ Buckland said that this principle applies also to men. He wrote⁹⁰: 'When a man, classical jurist or another, says of a man that he is diligent, he is not talking psychology: he is describing his conduct'. There is much truth in this; but there is a difference between a man and a bee. In legal proceedings you can put a man in the witness box and ask him questions. He can tell you about his

⁸⁸ Cf. Holmes, *op. cit.*, at p. 91: 'An act is always a voluntary muscular contraction and nothing else'.

⁸⁹ G. 2, 68.

⁹⁰ *Studi Bonfante* (1930), Vol. 2, at p. 88.

state of mind. If he lies, however, you are in no better position than if he were a bee, because you must then observe his conduct and the external circumstances which bear witness to his conduct.

In Roman law the acts of animals were primarily relevant to the wrongs which they committed. Here, above all, although man's desire for vengeance against the thing that hurt him led to an imputation of guilt against the animal,⁹¹ it was the harmful conduct of the animal which resulted in the liability of its owner to the *actio de pauperie*. At one time that may have been a liability for all harmful conduct of any animal. But by the end of the Republic, distinctions were being drawn which rested on the assumption that the animal's owner should not be liable where the act was contrary to the animal's nature.⁹²

1. Direct action or '*actio in factum*' under the '*Lex Aquilia*'

In the formulary procedure it was relevant to distinguish between a direct action and an *actio in factum*. That distinction was unimportant in the *cognitio extraordinaria*. The Compilers of the Digest still preserved it for the Aquilian delicts but abandoned it for the *actio de pauperie*.⁹³

Professor Wylie held the view that as long as there was an unbroken chain of purely physical causation between the initial act of the defendant and the ultimate damage upon which the Aquilian action was brought, the length of the chain was immaterial and a direct Aquilian action would lie. But he thought that if 'there should intervene a psychological element, manifested by a display of activity on the part of another human being or an animal', the chain of pure physical causation was broken and the direct action excluded. If, however, the other human being or the animal was merely a passive instrument, the chain of pure physical causation was not broken and the action was direct.⁹⁴ Wylie, therefore, would have held that the all-in wrestler who threw his opponent out of the ring on to a spectator was liable to a direct action.⁹⁵

How the Romans distinguished between an animal as a

⁹¹ Holmes, *op. cit.*, Chap. 1.

⁹² J. Kerr Wylie, '*Actio de pauperie*', *Studi Riccobono* (1936), Vol. 4, p. 461.

⁹³ *Ibid.*, at p. 477.

⁹⁴ *Ibid.*, at p. 470.

⁹⁵ See p. 200, *ante*.

'psychological element' and an animal as a 'passive instrument' is not at all clear. Wylie gives a distinction based on facts somewhat like these: X culpably chops a tree down. The tree falls near Y's horse. The horse is frightened and kicks out at S. There is an *actio in factum*. But if the falling tree had knocked Y's horse over on to S the action would have been direct.

Let us see whether the texts bear out this distinction. If X culpably fails to restrain an animal such as a mule, an ass or a horse, which he is driving or riding, then X is liable, presumably to a direct action.⁹⁶ The animal here is regarded as a passive instrument. If X frightens, without touching, a horse on which S is riding, or a mule which S is leading by a halter attached to S's thumb, and S is thereby injured, we would expect the action to be *in factum*, because there is no contact between X's body and the animal.⁹⁷ The question whether the animal is a passive instrument or not is irrelevant. One text gives an *actio in factum*.⁹⁸ Another gives a direct action.⁹⁹

The latter text, however, is not altogether trustworthy. It gives a direct action where X frightens or strikes the animal. If the animal was struck it would not be a passive instrument; it would be very active. There seems, however, to have been some doubt on the question. Thus, in D. 9, 1, 1, 7, it is said that if X strikes or wounds a horse and the horse kicks out and causes *damnum*, the action ought to be *in factum* rather¹ than a direct action. The fragment also shows that if an otherwise gentle animal is struck and kicks out, there is no *actio de pauperie* against its owner, but an action for an Aquilian delict against the striker; a horse does not act unnaturally if it kicks out when it is struck. If, however, a gentle horse kicks out when it is stroked, then it acts contrary to its nature. Accordingly, the *actio de pauperie* lies against its owner, and there is no action for an Aquilian delict against the stroker because there is no

⁹⁶ D. 9, 2, 8, 1; 9, 2, 52, 2. In the latter fragment, it is said that he inflicts *damnum iniuria* 'aeque si quis ex manu telum aut aliud quid immisisset'. The animal is compared with a missile hurled from X's hand.

⁹⁷ D. 9, 1, 1, 7, *infra*.

⁹⁸ D. 9, 2, 9, 3.

⁹⁹ D. 9, 2, 27, 34. Lawson, *op. cit.*, at p. 110, mentions that late scholia to the Basilica rightly point out that the action should be *in factum*.

¹ Comparatives like *magis*, *verius*, etc. often indicate the existence of a previous conflict of opinion.

culpability in stroking a gentle horse. We shall deal with these matters more fully later.

The most interesting fragment on the main question is :—

D. 9, 2, 11, 5 — Ulpian

Item cum eo qui canem irritaverat et effecerat ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse : sed Iulianus eum demum Aquilia teneri ait qui tenuit et effecit ut aliquem morderet : ceterum si non tenuit, in factum agendum.

X sets his dog on S.² Is X liable to a direct action? Proculus said that the action was direct, even if X was not holding the dog. Wylie thought that Proculus did not mind as long as there was direct cause and effect between X's act and S's injury. But that certainly is not true, because in D. 9, 2, 7, 3, where X pushed Y who pushed S, Proculus gave an *actio in factum*.³ Proculus may have drawn a distinction between men and animals, or regarded the dog as a missile hurled from X's hand—a passive instrument. Julian, however, drew this distinction. If X held the dog while he set it at S the action was direct—the dog was a weapon in X's hand⁴; but if X did not hold the dog the action was *in factum*. In the latter case, however, the dog was not regarded as a passive instrument.

2. Liability for 'pauperies'

The law of Justinian's time was that the owner was liable if his animal acted *contra naturam*. So there was no *actio de pauperie* if the animal was wild by nature. But if a wild animal or a tame animal was incited to act harmfully there would be liability for an Aquilian delict.

According to Wylie, however, there was no distinction between animals in the classical law. The distinction was between :

(1) Natural *pauperies*, i.e., where the animal was proved, or presumed from the nature of animals of the species, to have acted under some inherent vice. The owner was liable for *pauperies* unless the victim or the victim's *filius*, slave or animal had started the mischief.

(2) Non-natural *pauperies*, i.e., where this inherent vice was

² Cf. *Baker v. Snell* [1908] 2 K.B. 825.

³ See p. 199, *ante*.

⁴ Animated pincers, as it were !

neither proved nor presumed. The owner was liable for *pauperies only* where the animal's act could *not* be attributed to a natural force, *e.g.*, a clap of thunder, or to the act of a person or another animal.

Let us consider the texts:—

D. 9, 1, 1, 8 — Ulpian

Et si alia quadrupes aliam concitavit ut damnum daret, eius quae concitavit nomine agendum erit.

Animal X provokes animal Y so that Y causes *damnum*. The action lies against the owner of X, and not against the owner of Y. But Wylie points out that that would not be altogether true in classical law. If my dog snapped at the heels of your horse which was a known kicker, or untied the chain of your savage bull, then an *actio de pauperie* would lie against you if the horse or bull injured any person or thing other than my dog, because it would be a case of natural *pauperies*. If, therefore, this text represents Ulpian's original version, the case must have been one of non-natural *pauperies*, *e.g.*, where my dog snapped at your normally quiet horse.⁵

D. 9, 1, 1, 5 — Alfenus

Agaso cum in tabernam equum deduceret, mulam equus olfecit; mula calcem reiecit et crus agasoni fregit. consulebatur possetne cum domino mulae agi, quod ea pauperiem fecisset. respondi posse.

S, a groom, leads a horse into the yard of an inn. The horse sniffs at X's mule which is in the yard. The mule kicks out and breaks S's leg. Alfenus held X liable for *pauperies*. That would be a correct decision in both classical law and under Justinian. There was no evidence of any *culpa* in S. It is quite natural for horses to sniff at mules; but perhaps X's mule was somewhat touchy about being sniffed at by a horse and, it was thought, acted *contra naturam*.

Where the only question was which animal owner was liable for *pauperies*, the Romans applied their scales in balancing the culpability of the animals; and we may suppose that they applied their then existing knowledge of the nature of the animals concerned. There is another text which may, on one view, show this balance even more clearly.

⁵ In classical law, there would still be the question whether the action in this case would be direct or *in factum*. Wylie, *op. cit.*, at pp. 489–490.

D. 9, 1, 11 — Ulpian

Cum arietes vel boves commisissent et alter alterum occidit, Quintus Mucius distinxit, ut si quidem is perisset qui adgressus erat, cessaret actio, si is, qui non provocaverat, competeret actio: quamobrem eum sibi aut noxam sarcire aut in noxam dedere oportere.

Two rams or bulls fight, and one kills the other. It is said that Mucius drew the following distinction. If the dead animal was the aggressor no action would lie, but an action would lie if the dead animal was not the aggressor. The Security Council itself could have no more difficult problem. Wylie suggests that Mucius did not make this distinction, but decided that no action lay at all,⁶ presumably on the principle that each animal's aggression cancelled out that of the other. But he wisely points out that the decision is perfectly sound in principle. The action lies *if* the survivor was the aggressor, but that has to be proved. In the case instanced, it would be difficult to prove which of the animals started the fight⁷ and so no action would lie.

A similar question had arisen under the *Lex Aquilia*.

D. 9, 2, 45, 3 — Ulpian

Cum stramenta ardentia transilirent duo, concurrerunt amboque ceciderunt et alter flamma consumptus est: nihil eo nomine agi, si non intelligitur, uter ab utro eversus sit.

Two slaves were jumping over burning straw and collided. Both fell and one was burnt to death. If it could not be proved which had upset the other no action lay at all.

C. 'NOVUS ACTUS INTERVENIENS' OF A HUMAN BEING
AND AN ANIMAL

There are two texts which raise this possibility.

D. 9, 2, 57 — Iavolenus

Equum tibi commodavi: in eo tu cum equitares et una complures equitarent, unus ex his irruit in equum teque deiecit et eo casu crura equi fracta sunt. Labeo negat tecum ullam actionem esse, sed si equitis culpa factum esset, cum equite: sane non cum equi domino agi posse, verum puto.

X lends Y a horse. Y goes riding with other persons. The horse of Z, one of the riders, bumps against Y's horse. Y is thrown off and his horse's legs are broken. We are not concerned with

⁶ Wylie, *op. cit.*, at pp. 495-496.

⁷ Is there not usually a preliminary challenge in these cases?

Y's liability to X in the *actio commodati*, though Labeo says that Y is not liable. But Labeo is also reported to have said that Y could sue Z, presumably in an Aquilian action, if Z was guilty of *culpa*, but could not sue the owner of the horse—again presumably Z—for *pauperies*. The last decision is much too sweeping. If there was no *culpa* in Z and his horse had acted *contra naturam*, clearly he would be liable for *pauperies* even in the law of Justinian.⁸

D. 4, 3, 7, 6 — Ulpian

Si quadrupes tua dolo alterius damnum mihi dederit, quaeritur an de dolo habeam adversus eum actionem. et placuit mihi, quod Labeo scribit, si dominus quadrupedis non sit solvendo, dari debere de dolo, quamvis, si noxae deditio sit secuta, non puto dandam nec in quod excedit.

X owns an animal. Y deliberately causes the animal to inflict damage on S. The question raised here was whether S could sue Y in an *actio de dolo*. Labeo is reported to have decided that if X was insolvent, S could have an *actio de dolo*; but if X surrendered his animal Ulpian refused an *actio de dolo*,⁸ even if S had suffered damage in excess of the value of the animal. We are not told how Y caused the animal to inflict the damage, except that he did it intentionally; but one might have thought that Y could have been sued in either a direct action or an *actio in factum* under the *Lex Aquilia*.

We have already seen that there were conflicting views about the availability of the direct action where the animal was struck or frightened. In the time of Labeo there may have been greater doubts about the availability of even an *actio in factum*, where there was no direct contact with the defendant's body (*non corpore*), the animal itself was not damaged, but the animal had done damage to the plaintiff. If, then, Y had acted deliberately, Labeo might well have been concerned to look for relief for his client in the residuary ample bosom of the *actio de dolo*.⁹ Nor is it unreasonable to suppose that, on the facts of the par-

⁸ See, further, Wylie, *op. cit.*, at pp. 519-520.

⁹ See Wylie, *op. cit.*, at p. 517. See, also, D. 4, 3, 7, 7, where Labeo asks the same question where Y had unchained X's slave. Mucius thought that Y was liable for *furtum* if he had not been moved by compassion. It is also said that an *actio in factum* lies if Y was moved by compassion; *sed quare*, was this the view of Mucius? The fragment does not give a decision on Labeo's question. Cf. Inst. 4, 3, 16.

ticular case, Labeo may have been concerned with the availability of the *actio de dolo* because X, the owner of the animal, was too poor to pay for the damage done, and the animal itself was a comparatively worthless beast.

From our point of view, however, the importance of the passage lies in its assumption that X was liable for *pauperies*, even though the act was that of Y. We have seen that in classical law there may have been a distinction between natural and non-natural *pauperies*. If Y had opened the door of X's cowshed and let out X's savage bull, which rushed out and gored S, then X would have been liable for *pauperies* to S. When the *actio in factum* under the *Lex Aquilia* was recognised Y would also have been liable for an Aquilian delict. S could have brought both actions. Probably Labeo wanted the *actio de dolo* against Y because it was not certain whether the Aquilian *actio in factum* lay, and it was futile to proceed against poor X or his worthless bull. Perhaps Labeo decided that the *actio de dolo* did not lie or Ulpian thought he had reached that decision. In Ulpian's time Y could be sued in the Aquilian *actio in factum* and, therefore, Ulpian rightly said that there was no *actio de dolo*; but X was still liable for *pauperies*. In the Digest fragment, X is still liable for *pauperies*; but for some inexplicable reason an *actio de dolo* is given against Y if X is insolvent.

Now suppose that Y had opened the door of X's cowshed and so let out X's gentle cow, which then trampled on S's flowers. This would be a case of non-natural *pauperies*. Neither in classical law nor under Justinian would X have been liable for *pauperies*.¹⁰ There may have been doubts about the Aquilian *actio in factum* against Y in Labeo's time, and the only hope would be an *actio de dolo*. But under Justinian there was no doubt that an Aquilian action would lie against Y, and there was no point in bringing in the *actio de dolo* at all.

So, then, the cases in which animals are involved indicate that the *novus actus* of an animal, whose mischievous activity was started by a man,¹¹ was relevant to the following questions:—

(1) Was the man liable to a direct action or an *actio in factum* under the *Lex Aquilia*?; (2) was the man, at any rate in the earlier law, liable to an *actio de dolo*?; and (3) was the man's

¹⁰ Indeed, is it *contra naturam* for a cow to trample on flower-beds?

¹¹ Or a person or animal for whose wrongful act he was responsible.

liability, in either case, co-existent with the liability of the owner of the animal for *pauperies*?

We have seen that the answer to this third question depended on the historical development of the *actio de pauperie*.

Classical law. In the case of natural *pauperies* the owner's liability was excluded if the man in question was the plaintiff, his *filius*, his slave or his animal. But if the man in question was not the plaintiff, then the plaintiff could sue that man under the *Lex Aquilia*, and could also sue the owner of the animal for *pauperies*.

In the case of non-natural *pauperies*, the plaintiff could sue the owner for *pauperies*, unless the wrongful act of another person or of another animal had started the mischief. In the latter events he could not sue the owner; he must sue the other person under the *Lex Aquilia* or the owner of the other animal for *pauperies*.

Justinian's law. Since the only liability is for non-natural *pauperies*, the rule is that which has just been stated.

The cases in which the owner's liability for *pauperies* is excluded are cases in which he can say that the animal's act became wrongful through no act of his own. The only case in which there is any suggestion of weighing relative culpability is that in which two animals are fighting; even there it was probably a counsel of perfection.

THE STANDARDS OF THE ORDINARY MAN IN ENGLISH LAW

ERNEST H. SCAMELL

EVERY system of law, no matter how embryonic or developed it may be, represents a code of conduct which is laid down for the guidance of those individuals who are subject to the particular system. When human beings form themselves into a society, then if they are to live orderly and peaceful lives, it is obviously necessary for them to have at least one code of conduct on which to pattern their conduct in relation to their dealings with each other. Most modern societies, however, have more than one code of conduct, each of which is usually not mutually exclusive of the others. Thus, standing side by side, and no doubt to some extent hand in hand, with any given legal system, are usually to be found moral and religious codes. There is, however, a vital distinction between law and other codes of conduct, namely, that the sanctions for a breach of a rule of law are always material and not exclusively spiritual or moral¹; and it is primarily for this reason that systems of law do not aim at such a high standard of perfection of conduct as do other codes of conduct. In the result, codes of law tend to present the appearance of incompleteness. Thus, in English law, if a man stands by and watches a child drowning in one foot of water, he commits no civil or criminal wrong (unless he is the child's father or stands *in loco parentis* to the child), although such conduct would obviously amount to a particularly serious infraction of most moral and religious codes. This is one of many instances which demonstrate that English law is not to be equated with morality, but it by no means follows that the two are entirely exclusive of each other.² It is not difficult to see the element of morality in many of our substantive rules of law, and, indeed, the sources of English law being what they are, it could scarcely be otherwise.

¹ See *Bird v. Holbrook* (1828) 4 Bing. 628, *per* Best, C.J.

² See Pound, *Law and Morals*; Winfield, 'Ethics in English Case Law', 45 *Harvard Law Review* (1931) pp. 112-135.

Thus, for example, custom reflects moral ideas. Further, the practice of appointing Royal Commissions to investigate the effectiveness of existing law and to report on the desirability and method of change, results in a wide representation of moral ideas, the essence of which may be embodied into the Commission's recommendations to the legislature. Occasionally, however, statutory law may run counter to ordinary notions of justice,³ and it may perhaps be regretted that the law is not as Lord Holt thought it to be when in 1708 he said⁴: 'When an Act of Parliament is against common right and reason . . . the common law will control it and adjudge such Act to be void'.

But with the place of standards of morality in substantive rules of law it is not intended to deal. The chief concern of this paper will be to show the extent to which the standards of conduct of the ordinary man are reflected in the application of law to the facts of cases.

PUBLIC POLICY

From time to time, when dealing with questions as to the enforceability of contracts or the validity of gifts with conditions attached to them, the courts are concerned with the question of 'public policy'. It was not without considerable conflict of judicial opinion in the case of *Egerton v. Brownlow*⁵ that this task of adjudicating upon matters of public policy was finally entrusted to the courts. In this case the judges were summoned to the House of Lords to give their opinion. Eleven judges answered the summons, of whom nine, together with one of the five Lords, were of opinion that questions of public policy were questions which it was not competent for the judiciary to decide. The remaining two judges and four Lords, however, were in favour of appropriating to the court the function of deciding such questions and, accordingly, such was the decision of the House of Lords. Amongst the dissenting judges there was great diversity of opinion, but, for nearly all of them, the one insurmountable barrier was the realisation that if the courts were competent to decide questions of public policy, it would mean that, in all cases in which such questions arose for decision, they

³ See *Worthing Corp. v. Southern Rly. Co.* [1942] Ch. 437.

⁴ *City of London v. Wood* (1708) 12 Mod. 669, at pp. 687-688.

⁵ (1853) 4 H.L.Cas. 1.

would thereby be constituted arbitrators between conflicting principles of policy and morality. In the words of Baron Parke⁶: 'Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expedience", or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is best for the public good and to provide for it by proper enactments'.

This warning of Baron Parke has not passed unheeded, for although the courts cannot now refuse to admit their competence to decide questions of public policy, nevertheless, extreme caution is always exercised. Burrough, J.'s oft-quoted metaphor,⁷ that public policy is an unruly horse which carries its rider he knows not where, has been taken literally, and the judges, although obliged by the doctrine of precedent to jockey the fiery steed along the known horse-rides, have refused to direct their mount along hitherto untrodden lanes.⁸

This is not to say, however, that the courts do not recognise that any horse, fiery or otherwise, needs a certain amount of freedom, and this is demonstrated by the fact that in the past half-century many cases involving questions of public policy have been decided in ways which, to a greater or less degree, are at variance with previous decisions where similar issues have been involved. Thus, in the reign of James I, a knighthood might have been purchased for £1,095 apparently without offending any of the seventeenth-century principles of public policy,⁹ but the extent to which those principles had changed by 1925 was emphasised by Lush, J., when he said¹⁰: 'I cannot feel any doubt that a contract to guarantee or undertake that an

⁶ *Ibid.*, at p. 123.

⁷ *Richardson v. Mellish*, 2 Bing. 229, at p. 252.

⁸ See *Janson v. Driefontein Mines Ltd.* [1902] A.C. 484.

⁹ See *Re Wallace* [1920] 2 Ch. 301.

¹⁰ *Parkinson v. College of Ambulance* [1925] 2 K.B. 1, at p. 13.

honour will be conferred by the Sovereign . . . is against public policy'.

Again, in the case of *Fender v. St. John-Mildmay*,¹¹ Lord Atkin said of the decision in *Egerton v. Brownlow* itself, ' . . . the majority of the learned Lords held that the condition was bad inasmuch as it had the tendency to cause the holder of the estates to use unlawful and corrupt means to secure the rank of a peer which involved public duties as legislator and the like. . . . I doubt whether at the present day such a tendency would be held to exist or to invalidate such a condition'.

Yet again, it used to be thought that covenants in restraint of trade entered into by employees with their employers, and vendors of business premises with their purchasers, were, in the public interest, *prima facie* valid if the restraints were partial only, and necessarily void if they were general.¹² But in applying the test of public policy to modern conditions, the House of Lords has shown that neither of the above propositions is tenable at the present day.¹³

It can be seen, therefore, that despite serious judicial censure, the doctrine of public policy is a useful expedient for ensuring that in the application of rules of law to particular sets of circumstances, archaic and out-moded results are avoided. As Professor Winfield has said,¹⁴ this variability of public policy is a stone in the edifice of the doctrine and not a missile to be flung at it.

There is, however, one paramount difficulty concerning the doctrine of public policy and that concerns the means by which public policy is to be determined at any given time. It is one of the principle objections to the jurisprudential theory of Rousseau that his *volunté général*, though high-sounding in name, would be extremely difficult, if not impossible, to ascertain in fact. Rousseau, however, theoretically solves the difficulty by advocating that from time to time the people should be assembled and a general vote taken on the issues concerning which it is desired to ascertain the general will. Such a solution might have been practicable in so compact a country as Switzerland, the native land of Rousseau, but it is certainly not the method by

¹¹ [1938] A.C. 1.

¹² See *Mitchel v. Reynolds* (1711) 1 P.Wms. 181.

¹³ *Mason v. Provident Clothing and Supply Co., Ltd.* [1913] A.C. 724; *Nordenfelt v. Maxim Nordenfelt, etc.* [1894] A.C. 535.

¹⁴ (1928) 42 *Harvard Law Review*, p. 95.

which public feeling is tested in this country for the purpose of applying the doctrine of public policy.

Indeed, no attempt is made even to obtain the opinion of a cross-section of the community, as, for example, by empanelling a jury. It is the judges themselves who determine the requirements of public policy at any given time, acting upon their own knowledge of prevailing conditions, supplemented by that of counsel who are involved in the case. This being the case, it follows that to some extent the opinions of different judges will inevitably be conditioned, not only by reference to the times in which they hold office, but also, as Baron Parke has said,¹⁵ according to their individual education, habits, talent and dispositions. A modern example of a case where there was an almost equal division of opinion was in the case of *Fender v. St. John-Mildmay*.¹⁶ Here, the question was whether a promise made by a married man, after a decree *nisi* had been pronounced, to marry a third person when the decree was made absolute, was void on grounds of public policy. Both the judge at first instance and the Court of Appeal held that such a promise was void as being contrary to public policy. The House of Lords, however, by a majority of three to two, held that the promise was valid and not contrary to public policy. The minority in the House of Lords, and the courts below, laid a great deal of emphasis on the fact that the marriage *did* still exist at the time of the promise, but it is suggested with the greatest respect that the majority view of the House of Lords more accurately represents the view which the public at large would take, namely, that after the granting of the decree *nisi*, the petitioning spouse has said 'I have done with you'.¹⁷

But although diversity of opinion is inevitable in some cases, the degree of uncertainty concerning the judicial conception of the public good must not be over emphasised. To say, as Gray has said, that the law of a country at any given time depends upon the views held by the 'half-a-dozen old gentlemen' who happen to constitute the final Court of Appeal, is little more accurate than to say that the times of train departures from a particular railway terminus depend upon the pleasure of the

¹⁵ *Supra*, p. 229.

¹⁶ [1938] A.C. 1.

¹⁷ *Per* Lord Atkin, at p. 17.

engine drivers in charge. Both these statements might be true of revolutionists, but both judges and engine drivers can usually be trusted not to act upon impulse alone.

OBJECTIVITY IN ENGLISH LAW

Another way in which the standards of the ordinary man are reflected in the application of legal rules to the facts of cases, is through the agency of the theory of objectivity which pervades many branches of English law. In applying this theory, the courts frequently assess the nature or effect of the acts and omissions of litigants by reference to the standards of a hypothetical man.¹⁸ The result is that, generally speaking, it matters little what a party *intended* by his words and actions. Unless the law predicates a ready-made construction to particular conduct,¹⁹ the process of judicial interpretation is to impute the words and actions in question to a hypothetical man and then to assess their significance by reference to *his* intelligence, morality and standards of conduct generally. In order not to take the risk of generalising further, the application of the 'reasonable test' in some branches of English law will now be considered.

Law of Contract

The modern²⁰ law of contract is replete with examples of cases where the conduct of the reasonable man has been used as a standard of comparison for fixing liability. The cases may be divided very roughly into two groups. First, those which are concerned with the question of the existence of a contract, and secondly, those which deal with the contents or terms of a contract.

1. It is elementary to state that a contract is formed by way of an offer and an acceptance of that offer. But it is not always a simple matter to determine whether, in any given set of circumstances, an offer and/or an acceptance has been made. The

¹⁸ Such man may be a 'reasonable man' or a 'prudent man of business', or a 'high-minded man', according to the branch of law concerned.

¹⁹ As in the case of torts of strict liability, *e.g.*, conversion.

²⁰ It was not until the nineteenth century that the subjective approach was displaced by the objective approach in the law of contract. See *Cooke v. Oxley* (1790) 3 T.R. 654; *Adams v. Lindsell* (1818) B. & Ald. 681; *Head v. Diggon* (1828) 3 Mon. & Ry. 97; *Routledge v. Grant* (1828) 4 Bing. 653.

test to be applied is, however, clear, and it is this: would a reasonable man, standing by at the time when the contract is alleged to have been made, have construed out of the words and conduct of the parties a distinct offer and acceptance? If the answer to this question is 'yes', then it is wholly immaterial that one of the parties²¹ or, indeed, both²² of them did not intend²³ to enter into a contract. Accordingly, the statement that a *consensus ad idem* is a pre-requisite to the formation of a valid contract must be taken with some reserve.²⁴ Some illustrations will show how the courts have applied the above test and with what results.

First, one of the consequences of the application of the test is that a joker or a boaster may, in appropriate circumstances, find that his joke or boast has resulted in a binding contract. Thus, in *Wood v. Letrik*,²⁵ the defendants advertised their comb in the following boastful strain: 'New hair in 72 hours. Letrik Electric Comb. Great news for hair sufferers. What is your trouble? Is it grey hair? In ten days not a grey hair left. £500 guarantee'. The plaintiff, whose hair was grey, bought and used the comb as prescribed. Far from changing the colour of his hair, however, the only effect it had was to irritate his head. The plaintiff sued on the guarantee, and the court, following *Carlill v. Carbolic Smoke Ball Co., Ltd.*,²⁶ held he was entitled to succeed.

Another striking example of the application of the test is afforded by the fictitious case of *Bardell v. Pickwick* in *Pickwick Papers*. Mr. Pickwick, in telling his housekeeper, Mrs. Bardell, that a new manservant was shortly to come into the household, used such language that Mrs. Bardell thought that Mr. Pickwick was proposing marriage, and accepted. Not unnaturally, Mr. Pickwick refused to countenance Mrs. Bardell's assertion that he was contractually bound to marry her, whereupon Mrs. Bardell brought an action in the High Court for breach of promise of marriage. The judge directed the jury that if they, as reasonable men, would have construed Mr. Pickwick's

²¹ *Carlill v. Carbolic Smoke Ball Co., Ltd.* [1893] 1 Q.B. 256.

²² *Upton R.D.C. v. Powell* [1942] 1 All E.R. 220.

²³ In the metaphysical sense.

²⁴ It is a pre-requisite, provided that the *consensus* is understood to refer to *objective* consent.

²⁵ *The Times* newspaper, January 13, 1932.

²⁶ [1893] 1 Q.B. 256.

language and conduct on the occasion in question as a promise of marriage, then the contract to marry was established. The jury ultimately agreed that Mr. Pickwick's language could reasonably have been understood as a proposal of marriage and they proceeded to fix the damages at £750.

This is, perhaps, an extreme example of the consequences of the adoption of the 'reasonable test' by the courts, but parallels to it are not lacking in the reports.²⁷

The same test is applicable to the acceptance of an offer. Thus, if A, although intending to reject an offer, acts in such a way that he is reasonably understood as accepting, then he is bound.²⁸ Similarly, if A, though intending to accept an offer, does not evidence his intention by conduct reasonably amounting to an acceptance, then there will be no contract.²⁹ It seems to follow quite naturally from these premises that knowledge of the existence of the offer by the other party is *not* a pre-requisite to the formation of a contract. Despite almost universal criticism by textbook writers of the case of *Gibbons v. Proctor*,³⁰ and notwithstanding Australian³¹ and American³² decisions to the contrary, it is submitted that whether the offer has in fact been communicated to the other party is, in English law, immaterial; the only question is whether a reasonable man, standing by at the time, would assume from the other party's conduct that he was acting upon the offer.³³

2. With regard to the application of the objective test in determining the *contents* of a contract, the following rules may be derived from the cases:—

- (1) Where one party intends to make an offer on one set of terms and the other party accepts that offer on a different set of terms, then if one of the parties' interpretations as to the terms of the offer is reasonable, the court will enforce the contract in that reasonable sense.

²⁷ See *Clarke v. Dunraven* [1897] A.C. 59; *Upton R.D.C. v. Powell* [1942] 1 All E.R. 220.

²⁸ See *Sullivan v. Constable* (1932) 48 T.L.R. 369.

²⁹ *Quenerduaine v. Cole* (1883) 32 W.R. 185.

³⁰ (1891) 64 L.T. 594; and see, also, *Neville v. Kelly* (1862) 12 C.B. (N.S.) 740.

³¹ *R. v. Clarke* (1927) 40 C.L.R. 227.

³² *Fitch v. Snedaker* (1868) 38 N.Y. 248.

³³ As in *Upton R.D.C. v. Powell* [1942] 1 All E.R. 220.

- (2) If the offer is open to more than one reasonable interpretation, and, in fact, both parties' interpretations are reasonable, then no contract will have come into existence, since there will have been no *consensus ad idem* even in the objective sense.
- (3) If neither party's interpretation of the offer is reasonable, then there is no contract.³⁴

A good illustration of the first rule is provided by the case of *Tamplin v. James*.³⁵ An inn, known as 'The Ship', together with a saddler's shop, were put up for auction. In the sale room were plans of the property which clearly showed the exact limits of the land belonging thereto. At the back of the properties being sold were two pieces of ground not belonging to the properties, but which had been enjoyed therewith by the occupiers for many years under a special agreement. James, who was well acquainted with 'The Ship' and who had on many occasions enjoyed the amenities of the gardens which were in fact held under the special agreement, purchased the properties privately from the auctioneer, believing that he was purchasing the whole of the property which had been occupied by the tenants. On discovering his mistake, James repudiated liability, and Tamplin brought an action for specific performance of the contract. It was found as a fact that James's interpretation of the offer as including the two pieces of adjoining land was not reasonable, since he could have ascertained the true position by reference to the plan exhibited in the auctioneer's room; and it was also found that the auctioneer's interpretation was reasonable, and, accordingly, specific performance of the contract was decreed against James.

One probable consequence of the rule now under consideration is that the sender of a telegram may be bound by a mistake in the wording for which the Post Office is responsible,³⁶ pro-

³⁴ There is no specific authority for this last proposition, but it necessarily follows from the absence of *consensus ad idem* in either the subjective or the objective sense.

³⁵ (1880) 15 Ch.D. 215; see, also, *Van Praagh v. Everidge* [1902] 2 Ch. 266; *Smith v. Hughes* (1871) L.R. 6 Q.B. 597. The 'ticket cases' fall neatly under this rule. See *Parker v. S.E. Rly.* (1877) 2 C.P.D. 416, *per Mellish, L.J.*, at p. 423, and *Marriott v. Teoward Bros.* [1909] 2 K.B. 987, *per Pickford, J.*, at p. 943.

³⁶ See the American case of *Western Union Telegraph Co. v. Shotter*, 71 Ga. 760; but see *Henkel v. Pope* (1870) L.R. 6 Ex. 7.

vided that the mistake is not such as to be obvious to a reasonable recipient.³⁷

Examples of the second rule are *Scriven Bros. & Co. v. Hindley & Co.*,³⁸ and *Raffles v. Wichelhaus*,³⁹ in both of which cases the contract was held void for lack of *consensus ad idem* in the *objective* sense (both parties' interpretations of the terms of the offer being reasonable in each case).

These instances of the application of the objective test in determining the existence and contents of a contract, demonstrate that in considerable measure the ordinary business man may 'act on appearances' without attempting to go behind the scenes and delve into questions of metaphysical intention, or, indeed, seeking the assistance of a lawyer. But unfortunately for the security of the business man and the symmetry of the law, there are some instances in contract in which the common law adopts a subjective approach.

The modern law concerning the plea of *non est factum* is perhaps the most disquieting piece of subjectivity which our law of contract contains. No matter how orthodox a promissory note may appear, the promisor will not be liable if he can show that he was defrauded into thinking that the document was of a different character from what it was in fact.⁴⁰ This is a case where reliance on appearances would lead to unfortunate results. It is suggested by an American writer⁴¹ that the reason for this divergence from the strict theory of objectivity is the desire of the courts to temper the rigidity of the theory, and he cites Frank, J., as holding this opinion. It is submitted, however, that the true reason is historical and that the plea of *non est factum*, having become firmly embedded in the common law as early as the sixteenth century,⁴² was not susceptible to change when, in the early nineteenth century, the theory of objectivity was adopted.

Professor Williston⁴³ quotes as a further instance of the subjective approach the rule that an offer is terminated *ipso facto* by

³⁷ *Webster v. Cecil* (1861) 30 Beav. 62.

³⁸ [1913] 3 K.B. 564.

³⁹ (1864) 2 H. & C. 906.

⁴⁰ *Lewis v. Clay* (1879) 67 L.J.Q.B. 224; *Foster v. Mackinnon* (1869) L.R. 4 C.P. 704.

⁴¹ (1948) 23 *New York University L.Q.R.*, pp. 143-150.

⁴² *Thoroughgood's Case* (1584) 2 Co.Rep. 9a.

⁴³ *Selected Readings in the Law of Contract*, pp. 119-127.

the death of either party, although the fact of death is uncommunicated to the other party. But it is doubtful whether any such broad rule as this exists in English law. There is judicial authority for the proposition that 'As a general rule in the case of a contract, death [of the offeror] does not operate as a revocation. It is only so in exceptional cases . . .',⁴⁴ and although it is true that the death of the offeree terminates the offer,⁴⁵ it is difficult to see how the offeree could accept after his death even with the strictest of objective approach!

Law of Tort

It is perhaps in the law of tort more than in any other branch of law that the reasonable man makes most appearances. The reason for this is the recognition by the common law that although limitations on individual freedom must exist in the interests of general freedom, such limitations should not be of an artificial character, but should only require that individual freedom be exercised in a way which complies with those standards of conduct which would be expected of an ordinary man.

Thus, in cases where negligence is alleged, as well as in many other cases where one of the ingredients of an alleged tort is an act of negligence, some standard of comparison obviously had to be adopted, and the standard adopted by the common law was that of the reasonable man. Accordingly, whether, in a case of alleged negligence, there is negligence in the subjective or metaphysical sense is wholly irrelevant to the issue. Suppose that two motorists, A and B, collide into each other with their vehicles, and suppose that had A and B each been reasonable men, then the liability for the accident would have been accredited to A. A will be the person liable. It is wholly immaterial that a metaphysician could show that in fact B was morally responsible for the accident to the exclusion of A.

The place of the standards of conduct of the reasonable man in tort is too well known to require further elaboration here.⁴⁶

⁴⁴ *Per* Channell, B., in *Bradbury v. Morgan* (1862) 31 L.J.Ex. 462.

⁴⁵ *Per* Warrington, L.J., in *Reynolds v. Atherton* (1921) 125 L.T. 690.

⁴⁶ These standards are material in the following torts: Nuisance (reasonableness of user); malicious prosecution; slander of title; trade competition; negligence, and all other torts where negligence or intention is one of the ingredients. See, as to the standards in negligence, an article by H. T. Terry in *Selected Essays on the Law of Tort*, pp. 261-275; and generally, Clerk and Lindsell on *Torts* (10th ed.).

Law of Divorce

Having regard to the marriage vows which both parties make at the time of their marriage, namely, to take each other for better or for worse, it might seem strange that the likelihood of the continued existence of the marriage should depend in any degree on the parties behaving like 'reasonable spouses'. Yet frequently, such is the case. Thus, if a wife does not behave as a hypothetical reasonable wife would behave, then the husband may be entitled to a divorce on the ground of cruelty. Thus, in *Squire v. Squire*,⁴⁷ an invalid wife made certain demands on her husband, including requiring him to read to her for long periods during the night, and otherwise preventing him from sleeping. The result was that the husband's health and efficiency as an army officer became impaired. It was proved at the hearing that the wife's behaviour was not accompanied by any form of malignity or evil intention, and, on this ground, the judge at first instance dismissed the husband's petition for a divorce made on the ground of cruelty. The husband appealed, and the Court of Appeal reversed this decision, holding that whether in any particular case there is cruelty or not depends upon whether the acts or omissions complained of would, if imputed to a reasonable man—a reasonable wife in this case—constitute cruelty. As Tucker, L.J., said in the course of his judgment⁴⁸: 'It is an undisputed proposition that, generally speaking, a man is presumed to intend the natural and probable consequences of his acts. . . . Is there any authority which decides that this is inapplicable to acts amounting to cruelty in matrimonial cases? No such case was cited to us. On the contrary, there is a considerable body of authority to the opposite effect'.

Again, if a husband behaves in such an unreasonable way that his wife is obliged to leave him, he is guilty of constructive desertion. In the words of Lord Merriman in *Edwards v. Edwards*,⁴⁹ ' . . . if it is a natural consequence of a man's treatment of his wife that she leaves him, it is a common place that, whatever he says in words, he must be taken to intend that she will do so '. But a wife is expected to be reasonably tolerant and mere inattention will rarely justify a wife in leaving her husband,

⁴⁷ [1949] P. 51. See, also, *Kaslefsky v. Kaslefsky* [1950] 2 All E.R. 398.

⁴⁸ *Ibid.*, at p. 56.

⁴⁹ (1937) 54 T.L.R. 62.

for as Asquith, L.J., said in *Buchler v. Buchler*⁵⁰: 'It may, no doubt, be galling—or in some sense of the word humiliating—for a wife to find that the husband prefers the company of his men friends, his club, his newspaper, his games, his hobbies, or indeed, his own society, to association with her, and a husband may have similar grievances regarding his wife. But this is what may be called the reasonable wear and tear of married life, and if it were a ground for divorce, a heavy toll would be levied on the institution of matrimony'.

The exact materiality of insanity in testing the nature of a spouse's conduct against whom acts amounting to cruelty or desertion are alleged seems now to be settled. No problem arose in the case of desertion since this matrimonial offence can only be established if the existence of an intention to do the acts complained of is shown.⁵¹ In the case of cruelty, however, the position has only recently crystallised. In *White v. White*,⁵² Denning, L.J., disagreeing with his brethren on this point, held that insanity is no defence to a petition alleging cruelty except, possibly, where the petitioning spouse is aware at the time of the alleged acts of cruelty that the respondent is of unsound mind, and this judgment was followed by Pearce, J., in the recent case of *Lissack v. Lissack*.⁵³ The result of this decision is that, subject to the above-mentioned exception, metaphysical intention is wholly irrelevant in determining whether the acts of the respondent amount to cruelty. A spouse may be found guilty of cruelty even though he or she did not intend to do the acts complained of. Thus, it would be no defence to a petition of divorce on the ground of cruelty for the respondent to show that he was sleepwalking at the time he committed the acts, or that he was ignorant, by reason of some form of dementia, of the nature and quality of the acts committed and relied on.⁵⁴

Criminal Law

In criminal law, unlike the position in many branches of civil law, the nature and quality of an accused person's conduct

⁵⁰ [1947] P. 25, at p. 47.

⁵¹ See the remarks of Denning, L.J., in *White v. White* [1949] 2 All E.R. 339.

⁵² [1949] 2 All E.R. 339.

⁵³ [1950] 2 All E.R. 233.

⁵⁴ *Lissack v. Lissack*, *supra*.

is rarely measured by reference to the standards of a hypothetical man. Criminal law adopts an essentially subjective approach,⁵⁵ so that actual intention and not imputed intention assumes major importance. To the extent to which the maxim *actus non facit reum nisi mens sit rea* finds application in criminal law, it is to be applied subjectively. But there are three defences known to the criminal law one of which, self defence, depends for its success entirely upon the degree of correspondence between the conduct of the accused and that of a reasonable man, and two of which, namely, mistake and provocation depend *partially* for their success upon the application of this test.

The plea of 'self defence' may, in appropriate circumstances, justify an assault, a wounding or even a killing. To establish the defence, it must be shown, first,⁵⁶ that the accused committed the alleged acts in defence of himself, his wife, his parent, his child, his servant or his master, and secondly, that the force used was no more than would be regarded as absolutely necessary by a reasonable man for the defence of the party.⁵⁷ Accordingly, the accused's personal view of the amount of force required is irrelevant.

The position with regard to the defence of mistake has been stated to be as follows⁵⁸: 'At common law, an honest and reasonable belief in the existence of facts, which, if true, would make the act for which the prisoner is indicted an innocent act, has always been held a good defence . . .'. It will be noticed from this dictum that two essentials must be proved. First, it must be shown that the mistake is one which, in all the circumstances, a reasonable man would have made; and secondly, it must be established that the accused did *in fact* make that mistake. One example will suffice. In *R. v. Tolson*,⁵⁹ the accused, Mrs. Tolson, was charged with bigamy. Five years before the alleged bigamous marriage she had been informed that the ship on which her husband was sailing at the time had been lost 'with all hands'. Soon after her second marriage, however, her first husband reappeared. Mrs. Tolson's defence of reasonable mistake of fact was upheld by the court.

⁵⁵ The reason for this appears, *infra*, p. 245.

⁵⁶ 2 Rolle Abr. 546.

⁵⁷ See *R. v. Driscoll* (1814) C. & Mar. 214.

⁵⁸ *R. v. Tolson* (1889) 23 Q.B.D., *per* Cave, J., at pp. 181, 182.

⁵⁹ (1889) 23 Q.B.D. 168.

In the defence of provocation two things must be shown. First, that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use violence with fatal results, and secondly, that the accused was in fact acting under the stress of such provocation.⁶⁰

It will be noticed that in the cases both of mistake and of provocation, it is not in itself sufficient for the accused to prove that he acted as a reasonable man would have acted. He must go further. He must show that he did *in fact* labour under the mistake, or that he did *in fact* lose his self control, as the case may be. The test is partially objective and partially subjective. The value and function of the objective element in the defence of provocation is reflected in the remarks of Lord Simon in *Holmes v. D.P.P.*, when he says⁶¹: ‘ . . . the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone . . . that if a man’s nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays. The injury done to a man’s sense of honour by minor physical assaults may well be differently estimated in differing ages. And in the same way one can imagine, in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self control even more than would an act of physical violence. But, on the other hand, as society advances, it ought to call for a higher measure of self control in all cases ’.

Law of Trusts

The reasonable man of common law has a brother in equity in the person of the prudent business man. The principal character in the law of trusts is the trustee, and the standard of conduct which he is expected to display has long been settled. The position is that except where definite duties have been imposed upon trustees,⁶² they are only bound to use such dili-

⁶⁰ *Holmes v. D.P.P.* [1946] A.C. 588, *per* Lord Simon.

⁶¹ [1946] A.C. 588, at pp. 600–601.

⁶² As to these duties, see Underhill, *Law of Trusts and Trustees* (9th ed.), p. 288 *et seq.*

gence and care in the management of the trust fund as men of ordinary prudence and vigilance would use in the management of their own affairs.⁶³

But although the rule is well settled, it is sometimes difficult to predict with any degree of certainty what standards of care the court will attribute to the prudent man of business on any given occasion. Perhaps the main reason for this is that, as Lord Blackburn expressed it in the case of *Speight v. Gaunt*,⁶⁴ 'Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash'. It may well be for the above reason that so much has sometimes been read into the word 'prudent' by the courts in relation to the expression 'prudent business man'. It is clear, at any rate, that a higher standard of conduct is expected of equity's prudent man of business in relation to the management of the trust estate than would be expected of the common law reasonable man. Upon one interpretation of section 61 of the Trustee Act, 1925, however, the court may give relief from the consequences of a breach of trust to a trustee whose conduct falls short of that of a prudent man of business, provided that his conduct conforms to the standards of an honest reasonable man.

Perhaps the greatest call on a trustee's prudence is made when the duty to invest capital moneys arises. The general rule is that a trustee may invest trust funds in any securities authorised by statute or by the settlement, but in no others. But in determining which securities to select, a trustee is still bound to exercise prudence.⁶⁵ All that the statute or the investment clause in the settlement does is to shift the onus of proof so that it is left to the beneficiary to establish lack of prudence and not for the trustee to justify the sagacity of the investment.⁶⁶ Furthermore, in connection with investment clauses contained in settlements, some difficulty of interpretation may be experienced by trustees. For example, in the case of *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh*,⁶⁷ trustees were empowered by the trust

⁶³ *Speight v. Gaunt* (1883) 9 App.Cas. 1; *Brice v. Stokes* (1805) 11 Ves. 319.

⁶⁴ (1883) 9 App.Cas. 1.

⁶⁵ See *Re Whiteley* (1886) 33 Ch.D. 347, *per* Cotton and Lopes, L.JJ.

⁶⁶ *Shaw v. Cates* [1919] 1 Ch. 389, *per* Parker, J., at p. 395.

⁶⁷ [1934] A.C. 529.

instrument to 'invest trust moneys in such investments as they in their absolute discretion' thought fit. It was proved that during his lifetime the settlor had commonly made investments by way of loans on the security, in some cases of personal property, and in other cases of commercial reputation only, as was the common practice in Malaya. The sole surviving trustee continued lending trust moneys at interest on similar security on the strength of the investment clause contained in the trust instrument. It was held by the Privy Council that although the investment clause did authorise the trustee to lend trust moneys at interest on the security of personal property, it did not authorise the lending of money on a mere personal bond to pay. Moreover, although it was shown that the trustee, in making such loans, had acted honestly, it was further held that in so doing he had not acted reasonably, and, accordingly, no relief could be afforded him under section 61 of the Trustee Act, 1925.⁶⁸

Law of Bankruptcy

The legal family of hypothetical men is not confined to the 'reasonable man' and the 'prudent man of business'. There is yet a further member, namely, the 'high-minded man'. It has long been settled that officers of the Supreme Court must observe a somewhat higher standard of conduct when acting in their official capacity than that of the reasonable man or prudent man of business, and the standard prescribed is that of a 'high-minded man'.⁶⁹ The duties of officers of the court are not, of course, confined to matters of bankruptcy and, accordingly, the present sub-title may appear too limited, but the reason for its existence is that most of the cases have concerned receivers and trustees in bankruptcy.⁷⁰

In *Ex p. James*,⁷¹ James, L.J., laid down the principle as follows: 'It [the Court] will direct its officer to do that which

⁶⁸ See, further, as to the construction of investment clauses, *Re Harari's S.T.* [1949] 1 All E.R. 430, which explains *Re Braithwaite* (1882) 21 Ch.D. 121, and *Bethel v. Abraham* (1873) L.R. 17 Eq. 24.

⁶⁹ *Ex p. Simmonds* (1886) 16 Q.B.D. 308; *Ex p. James* (1878) L.R. 9 Ch. 609; *Re Tyler* [1907] 1 K.B. 865.

⁷⁰ In *Re Banister* (1879) 12 Ch.D. 131, the high-minded man appeared in connection with a sale of land ordered by the court. The judicial trustee is also an officer of the court, and it would seem to follow that his obligation in relation to the administration of trusts is to act as a high-minded man and not merely as a prudent man of business.

⁷¹ (1878) L.R. 9 Ch. 609.

any high-minded man would do . . .', and, amongst other things, it is expected of the high-minded man that he will act according to 'natural justice'⁷² and as 'an honest man actuated by motives of morality and justice'⁷³ would act; that he will not do a 'shabby thing'⁷⁴ or perpetrate a 'dirty trick',⁷⁵ and generally that he will be 'even more straightforward and honest than an ordinary person in the affairs of everyday life'.⁷⁵ Thus, it has been held that a high-minded man would not take advantage of a payment which had been made to him under a mistake of law, so that a trustee in bankruptcy must return money so paid.⁷⁴

The courts are not always agreed as to what standard of conduct should be attributed to the high-minded man. In *Re Tyler*,⁷⁵ the Court of Appeal agreed with the view of high-mindedness taken by Bingham, J., at first instance, but in *Re Hall*,⁷⁶ the same court disagreed with Bingham, J.'s view of high-mindedness. Such conflicts of opinion are inevitable, for as Salter, J., has said⁷²: 'Legal rights can be determined with precision by authority, but questions of ethical propriety have always been and will always be the subject of honest difference among honest men', and in these cases '. . . the question to be decided is . . . one of ethics, not of law'.

CONCLUSION

So far, all that has been considered is some of the branches of English law in which the standards of hypothetical men are adopted as criteria for determining the nature and quality of conduct. It remains to consider the extent to which these criteria are ideal for the purpose of administering law, for they have by no means escaped criticism.

It is the thesis of the Russian jurist that the result of the adoption of 'cardboard personification'⁷⁷ is that correction is not given where correction is needed, for a clever man will be excused from the consequences of conduct which he can foresee will be harmful if the reasonable and less clever man would not,

⁷² *Re Wigzell* [1921] 2 K.B. 835, *per* Salter, J.

⁷³ *Re Thellusson* [1919] 2 K.B. 735.

⁷⁴ *Ex p. Simmonds* (1886) 16 Q.B.D. 308, *per* Lord Esher, M.R.

⁷⁵ *Re Tyler* [1907] 1 K.B. 865, *per* Farwell, L.J., at p. 871.

⁷⁶ [1907] 1 K.B. 875.

⁷⁷ See an interesting article by A. K. R. Kiralfy in the *Juridical Review*, December 1948, pp. 195-206.

in similar circumstances, have foreseen any harm. And conversely, the simple man may be made to answer for conduct which he himself could not foresee would be harmful. But it may be replied to this criticism that the object of our civil law is to afford reasonable protection to persons who suffer harm, and not to give correction to the person occasioning the harm. In the words of Bacon,⁷⁸ 'The law doth rather consider the damage of the party wronged, than the malice of him that was the wrongdoer'. Correction is one of the objects of the criminal law and quite properly, therefore, the subjective test does hold sway in this field.⁷⁹

Again, an American writer⁸⁰ has offered the following criticism of the legal family of hypothetical men: 'He [the jurist] will find his own current literature populated with hypothetical judges, jurors and litigants, and he will be surely tempted to secure his intellectual peace by thrusting into the complex of legal events these spirits of the law, just as primitive men thrust into the events of physical nature the gods of the calm and the storm. . . . The important point is that the use of personification, whether literal or figurative, has the common property of setting the mind at rest in regard to those very puzzles that ought to excite it to activity'.

This criticism represents a direct attack on all forms of objectivity and as such is a 'defendant's criticism'. It does not sufficiently consider the unfortunate plaintiff who may be disappointed in his reasonable expectations. So that justice may be done as between both parties, some standard of objectivity must be adopted and the only alternative to 'personification' is the adoption of a set of abstract ideals. But Professor Friedmann finds from the administration of law in Nazi Germany that when law is administered according to ideologies, then the doctrine of precedent is displaced by a 'law slumbering in the heart of the judge',⁸¹ and the Rule of Law becomes the 'Rule of Sentiments'.

⁷⁸ *Maxims* vii.

⁷⁹ In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering. . . . But it is otherwise in criminal cases, for there *actus non facit reum nisi mens sit rea*—*Lambert v. Bessey* (1681) T. Raym. 421.

⁸⁰ E. S. Robinson, *Law and Lawyers* (1935), at p. 126.

⁸¹ (1943) 59 *Law Quarterly Review*, p. 139.

On the whole it would appear that the adoption of the standards of the ordinary man as a yardstick by which to measure conduct in civil cases represents one of the assets of English law rather than one of its liabilities. It ensures that as far as possible, 'justice according to the law' shall mean 'justice according to the ordinary man'.

MALICE AND WILFULNESS IN STATUTORY OFFENCES

J. LL. J. EDWARDS

THE administration of English criminal justice for centuries past has been founded on the established principle that no man shall be punished for committing a crime unless a guilty mind, *mens rea*, can be imputed to him. Applied vigorously up to the middle of the last century, it is unfortunately true that the doctrine of *mens rea* has since tended to wane. This retrograde movement has been helped to a considerable degree by the legislature's increasing practice, when using the criminal law as a means for securing a well-ordered structure of behaviour, of by-passing the above cardinal principle. Today, there is good reason to echo the words of another writer who asked 'whether the demands of social expediency may not have gone too far in making criminals out of well-intentioned citizens'.¹ If the criminal law is not to fall into disrepute it is worth while considering whether emphasis should not be restored to protecting the blameless citizen, and a stand made against construing as offences of absolute liability crimes wherein the interests of society at large are not placed in jeopardy.

That some, at least, of the judges are fully alive to the above danger is evident from the recent pronouncement by Lord Goddard in *Younghusband v. Luftig*.² While recognising the power of the legislature to create offences which consist solely in doing an act whatever the state of mind of the actor may be, he emphasised that such cases must be regarded as exceptions to the rule that a person cannot be convicted of a crime unless he has not only committed a forbidden act or default but also that a wrongful intention can be imputed to him.

¹ Dr. W. T. S. Stallybrass in 'The Eclipse of *Mens Rea*', (1936) 52 *Law Quarterly Review*, at p. 57. See, too, Keeton, *Jurisprudence* (2nd ed.), at p. 317; Paton, *Jurisprudence*, at p. 371; and Sayre, (1932) 45 *Harvard Law Review*, at p. 1017.

² [1949] 2 K.B. 354, at p. 370. See, too, the encouraging views expressed in *Reynolds v. G. H. Austin & Sons, Ltd.* [1951] 1 All E.R. 606, *per* Humphries, J., at p. 608, and *per* Devlin, J., at pp. 610-611.

Such a statement is particularly reassuring at the present day. However, that assurance is to a large extent dissipated when we examine the manner in which the courts are sometimes satisfied that this requirement of *mens rea* has been fulfilled. This is so even in the case of statutory offences which expressly state the particular mental element required to be proved. Take, for instance, two of the principal statutes in our criminal law, the Malicious Damage Act, 1861, and the Offences against the Person Act, 1861. A perusal of these enactments and others, like the recently-invoked Conspiracy and Protection of Property Act, 1875, will indicate the repeated use of either the word 'wilfully' or 'maliciously'. Amongst other similar expressions found in offences scattered about the statute book are the words 'knowingly', 'corruptly' and 'fraudulently'. At first glance, each of these terms clearly imports the need for *mens rea*, a guilty mind of one sort or another. Whenever any one of these epithets is found in the definition of a statutory offence it is not unreasonable to suppose that the legislature thereby laid down the specific mental element required. The difficulty, it must be admitted, is in declaring what is the particular state of mind signified by the respective words. That difficulty becomes aggravated when we find some judges using language expressive of the opinion that a guilty mind is not even necessary.

In this paper I propose to confine myself to examining, first, the necessity for *mens rea* in statutory offences whose definitions contain one or other, or both, of the widely used terms 'maliciously' and 'wilfully', and secondly, the application of the defence of claim of right in such offences. In tracing the various, often conflicting, interpretations given to these expressions, we shall see how the criminal law of today has changed its conception of *mens rea* from the old notion of moral wrongdoing to the present test of mere intentional doing of forbidden acts. The current emphasis is on an objective standard of behaviour to which the accused must measure up at his peril. The pendulum of change has, in fact, reached the full extent of its arc, and our task, using malice and wilfulness as our yardsticks, is to judge whether that pendulum has not exceeded the danger mark.

MALICE

Pre-eminent amongst words describing states of mind in criminal law is the term 'malice' or 'malicious', than which, according to Sir James Stephen, 'there is no word in the whole range of criminal law which it is more important to understand correctly'.³ Perhaps best known of all is its use in the phrase 'malice aforethought' which describes the manifold degrees of *mens rea* in the crime of murder. Another context in which malice appears is in relation to criminal libel. I mention these two common law crimes mainly as a matter of interest and, except where necessary for comparative purposes, no further reference will be made to them. Turning our attention to offences created by statute, examination of the Malicious Damage Act, 1861, shows that out of fifty-four sections, defining various offences against property, only four omit the word maliciously,⁴ while in the Offences against the Person Act, 1861, twelve sections in all require proof of malice.⁵ In sharp contrast, the term appears only once throughout the Larceny Act, 1916.⁶ There are, of course, other minor statutory offences⁷ in which the word 'maliciously' appears, but insomuch as the reported cases almost invariably arise under the two major statutes of 1861, it is inevitable that we direct our attention to that fertile field of case law.

Before proceeding to classify the different kinds of malice to which the judges have given their attention, it will be advisable to trace very briefly the development of malice through the statute law of the past seven hundred odd years.⁸

DEVELOPMENT OF STATUTORY MALICE

The earliest mention of malice as a mental element in crime

³ *General View of English Criminal Law*, p. 81.

⁴ The exceptions are ss. 36, 47, 50 and 54. It is interesting to note that in his *History of Criminal Law*, Vol. 2, p. 119, Stephen is guilty of an error in including, as exceptions, ss. 52 and 53. Both these sections contain the term 'maliciously'.

⁵ These are ss. 16, 17, 18, 20, 23, 24, 26, 28, 29, 30, 32 and 33.

⁶ In section 10, which deals with the malicious or fraudulent abstraction of electricity.

⁷ *E.g.*, Electric Lighting Act, 1882, s. 22, and Explosives Substances Act, 1883, s. 2.

⁸ For a full account, see East, *Pl. of Cr.*, Vol. 2, pp. 1015-1017; Stephen, *History of Criminal Law*, Vol. 3, pp. 109-113 and 188-190, and L. Radzinowicz, *A History of English Criminal Law*, Vol. 1, pp. 49-73, 574-575, 630-631, 654-657.

was in the middle of the thirteenth century when Bracton, writing of arson, indicated the necessity for proving that the burning was done with evil design, *mala conscientia*.⁹ Certainly arson owes its origin to the common law, but its importance in relation to malice is self-evident when we realise that upon the law of arson was founded the entire structure of statutory offences dealing with malicious damage to property. Coke, writing in the seventeenth century, repeats Bracton's language and points to the form of indictment in arson which required that the burning be *voluntarie, ex malitia sua praecogitata*. 'If it be done by mischance, or negligence',¹⁰ says Coke, 'it is no felony'.¹¹ What was written then remains true today, but we shall note the considerable change effected in the interpretation of *malitia*.¹²

The first statute to punish injuries to property, passed in 1285,¹³ contained no mention of the word malice, but we find the expression in one of the earliest statutes designed to punish crimes against the person. Enacted in 1403,¹⁴ this statute made it a felony to cut out the tongue or put out the eyes of any person, by any malice prepense. In 1545 we find a more extensive enactment dealing with offences against both the person and property.¹⁵ It began with the preamble, 'Where divers and

⁹ *De Legibus*, 146b.

¹⁰ Yet 6 Ann, c. 31 made it an offence for any servant to *negligently* set fire to a house or outhouse.

¹¹ *Third Institute*, f. 67. One of the early statutes dealing with arson was in 1723, *viz.*, 9 Geo. 1, c. 22. Strangely, it contained no reference to the necessity for malice, but in *Susan Minton's Case* (East, *Pl. of Cr.*, Vol. 2, p. 1033) it was held that malice was still necessary.

¹² In their *History of English Law*, Vol. 2, at p. 467, Pollock and Maitland put forward the view that it is rather the popular than the legal sense of the word that has changed. When it first came into use, they explain, *malitia* hardly signified a state of mind, some qualifying adjective such as *praemeditata* or *excogitata* was needed if much note was to be taken of intention or of any other psychical fact. Regarding *malice prepense* (see statute 5 Hen. 4, c. 5 referred to in the text above) they are of opinion that its earliest meaning was little more than intentional wrongdoing. This interpretation is not shared by East and Foster, for whose views see text above.

¹³ 13 Edw. 1, st. 1, c. 46, which punished the throwing down of enclosures rightfully made by a person entitled to approve a common. Together with subsequent enactments, it provides an interesting commentary on the items of property considered sufficiently important to warrant legislation for their protection. To give only two examples, 37 Hen. 8, c. 6 dealt with 'unlawful, wilful, malicious injuries to trees', and 22 & 23 Chas. 2, c. 11, s. 12, related to the 'wilful' destruction of ships.

¹⁴ 5 Hen. 4, c. 5.

¹⁵ 37 Hen. 8, c. 6.

sundry malicious and curious persons being men of evil and perverse dispositions, and seduced by the instigation of the devil . . . of their malicious and wicked minds have of late invented and practised a new damnable kind of vice', and then proceeded to list certain offences including the burning of timber frames for houses, cutting out of beasts' tongues, cutting off the ears of the King's subjects and the barking of various kinds of trees.¹⁶ The next statute of any importance was the Coventry Act, 1670,¹⁷ which provided that it shall be a felony 'of malice, forethought and by lying in wait, to unlawfully cut out or disable the tongue, put out an eye, slit the nose, or cut off or disable any limb or member . . . with intention in so doing to maim or disfigure'. Commenting on this statute, East writes that 'if a corporal violence be intended, the more malignant the intention the more clearly it falls within the malice described by the Act'.¹⁸ Another statute,¹⁹ closely following the Coventry Act, is cited by Foster to illustrate the frequent use of the terms malice and maliciously to denote 'a wicked, perverse and incorrigible disposition'.²⁰ The same writer later states that the words '*per malitiam*' and '*malitiose*' constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo*, *mala conscientia*.²¹

If we look for assistance in the reports on the early meaning of malice, it will be found that the cases turned on the provisions of the Black Act, 1723.²² Among other offences, this statute made it a felony maliciously to kill, maim or wound any cattle. In three cases decided in 1789²³ it was held that to bring an offender within the statute it was necessary to show that the maiming of the animal was done from some malicious motive

¹⁶ It is interesting to note that whereas the burning of timber frames was made a felony, punishable with death, all the other offences were punishable by a fine of £10!

¹⁷ 22 & 23 Chas. 2, c. 1.

¹⁸ 1 Pl. of Cr., p. 400.

¹⁹ 4 & 5 Wm. & M., which made it an offence to 'maliciously command, hire or counsel any person to do any robbery'.

²⁰ Crown Cases, p. 257, citing Lord Raym. 1487. This passage was cited, with approval, by Mellor, J., in *R. v. Ward* (1872) 1 C.C.R. 356, at p. 360. See, too, *R. v. Mawgridge*, Kelyng 119, at p. 127.

²¹ *Ibid.*, p. 256.

²² 9 Geo. 1, c. 22. For a detailed survey of the provisions of this Act see (1945) 9 *Cambridge Law Journal*, pp. 56-81.

²³ *R. v. Pearce*, 1 Leach 527; *R. v. Hean*, 3 B. & C. 252, and *R. v. Shepherd*, 1 Leach 539.

towards the owner of it, and not merely from an angry and passionate disposition towards the beast itself. Some years later ²⁴ we find all the judges holding that it is not sufficient to prove malice even against a servant or relation of the owner; it must be against the owner of the cattle. As a result of these decisions, legislation was passed ²⁵ providing that it is immaterial whether the malice is conceived against the owner of the property in respect of which it shall be committed or otherwise. A similar provision has been retained in the Malicious Damage Act, 1861, s. 58.

Can it justifiably be argued, however, that in making this provision the legislature had in mind the extension of the law to cover cases involving malicious injury to one's own animal or, as must follow, any inanimate property of one's own. This astonishing interpretation was adopted by Lord Russell, C.J. (after consulting Grantham, J.), in the case of *R. v. Parry* ²⁶ where a man who, in a fit of drunken spite, kicked and stabbed his own horse was convicted of maliciously wounding the animal. Such a case, it is suggested, falls more appropriately within the Protection of Animals Act, 1911. The logical extension of the decision in *R. v. Parry* would make a farmer liable, *e.g.*, under section 15 of the Malicious Damage Act, who, incensed with his agricultural machinery which through some mechanical default had constantly failed to work smoothly, sets about destroying it. Unless there is some ulterior object in view by the accused, such as defrauding a third party ²⁷ (*e.g.*, an insurance company), there would appear to be no reason why the legislature should seek to punish a man under the Malicious Damage Act, 1861, for damaging his own property, whether animate or inanimate.

In the field of damage to property no further enactments of note were passed until 1827, when an attempt was made to secure some order out of the previous haphazard legislation. This had been designed solely to meet particular kinds of mischief

²⁴ *R. v. Austen* (1822) Russ. & Ry. 490.

²⁵ (1823) 4 Geo. 4, c. 54, s. 2 and (1827) 7 & 8 Geo. 4, c. 30, s. 25.

²⁶ (1900) 35 L.J. Newsp. 456. See, too, *R. v. Welch* [1875] 1 Q.B.D. 23, in which case there was no evidence to show that the prisoner was actuated by any ill-will towards the owner of the mare, nor by any spite towards the mare itself. In fact, the prisoner's only motive was the gratification of his own depraved tastes. He was convicted under the Malicious Damage Act, 1861, s. 40 (1). For Kenny's view, approving the decision in *R. v. Parry*, see *Outlines of Criminal Law* (15th ed.), p. 195.

²⁷ See, for example, section 3 of the Malicious Damage Act, 1861.

which, from time to time, happened to require attention, a conclusion borne out by the fact that twenty-eight statutes in all²⁸ were repealed by the consolidating Act.²⁹ This was itself repealed and enlarged by the present governing statute, the Malicious Damage Act, 1861. So far as injuries to the person were concerned, Lord Ellenborough's Act of 1803³⁰ is generally regarded as the germ from whence sprang, through the medium of one intermediate statute,³¹ the comprehensive Offences against the Person Act, 1861, which is still in force. It is with these two major statutes and the superimposed case-law that we are principally concerned.

CLASSIFICATION OF STATUTORY MALICE

Our next task is to classify, if possible, the different degrees of *mens rea* which are said to fulfil the requirement of statutory malice. This can only be done by analysing the language used by the judges. It will be found that such analysis indicates four different senses in which the term is applied, namely,

1. Express malice.
2. Implied malice.
3. Transferred malice.
4. General and Particular malice.

Let us take them in turn.

1. *Express Malice*³²

This is sometimes referred to as actual malice³³ or malice in fact,³⁴ and indicates the commonly accepted meaning of malice, namely, wickedness, a disposition to injure others without cause merely to procure personal gratification or from a spirit of revenge.³⁵ As we have already seen, this was the construction placed upon the old statutes dealing with malicious crimes.

²⁸ For the full list, see Stephen, *Hist. of Cr. Law*, Vol. 3, p. 190.

²⁹ Repealed by 7 & 8 Geo. 4, c. 27, the law was consolidated by 7 & 8 Geo. 4, c. 30.

³⁰ 43 Geo. 3, c. 58.

³¹ (1828) 9 Geo. 4, c. 31, which repealed, so far as related to England, all the earlier Acts concerning personal violence.

³² *E.g.*, *R. v. Davies* (1858) 1 F. & F. 69, *per* Crompton, J., at p. 71.

³³ *E.g.*, *R. v. Pembliton* (1874) 2 C.C.R. 119, *per* Lush, J., at p. 123.

³⁴ *E.g.*, *Bromage v. Prosser* (1825) 4 B. & C. 247, *per* Bayley, J.

³⁵ *Webster's Dictionary*. The *Oxford English Dictionary* defines malice as wrongful intention, that kind of evil intent which aggravates the guilt of certain offences.

Today, its principal application in criminal law is in libel where, as in the law of tort, evidence of express malice is necessary to destroy the defence of qualified privilege or fair comment. Evidence is available, however, that at least up to the end of the last century many of the judges were imbued with the idea that it was necessary to prove malice in its natural sense in all crimes of malice. Thus, in 1839, we find a case ³⁶ in which the accused was charged with maliciously killing a sheep, evidence being given that the intent of the prisoner was to steal the carcass. Both Alderson, B., and Parke, B., were agreed that killing with intent to steal came within the spirit of the term 'maliciously to kill' which, they said, 'ought to be construed to mean killing *malo animo*: any improper motive or bad intention would satisfy the statute'. In *Daniel v. James*,³⁷ decided in 1877, we find Lord Coleridge, C.J., expressing a similar opinion. In that case the accused was charged with maliciously killing a dog, contrary to section 41 of the Malicious Damage Act, a section which has recently been the subject of a remarkable decision by the Divisional Court.³⁸ Referring to this particular section, Lord Coleridge declared that 'it points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to (in the section), simply for the purpose of indulging a cruel disposition'.³⁹ We also have the opinion of that eminent judge, Brett, J. (later Esher, M.R.), in *R. v. Mathews and Twigg*⁴⁰ in which case the accused were charged with maliciously stopping-up an airshaft with intent to obstruct a coal mine. 'I think', said Brett, J., 'that the act charged must be done not only wilfully but maliciously, that is to say, with a wicked mind, and if it is done under a bona fide claim of right it is not done maliciously according to our criminal law'. This natural meaning of malice, as the motives which prompt a man's conduct, was approved by the Court of Criminal Appeal as

³⁶ *R. v. Fordham* (1839) 4 J.P. 397. See, too, Lord Abinger, C.B., in *R. v. James* (1837) 8 C. & P. 131, at p. 132, a case which turned on the same statute, viz., 7 & 8 Geo. 4, c. 30, s. 16.

³⁷ [1877] 2 C.P.D. 351.

³⁸ *Gott v. Measures* [1948] 1 K.B. 234, discussed fully later.

³⁹ 2 C.P.D., at p. 353.

⁴⁰ (1876) 14 Cox C.C. 5, at p. 7. See, too, Mellor, J. (*arguendo*) in *R. v. Ward* (1872) L.R. 1 C.C.R. 356, at p. 360, where he uses the phrase *malus animus* to describe malice.

recently as 1911, in the interesting case of *R. v. Syme*.⁴¹ The accused was charged with maliciously sending a letter to the late Ramsay MacDonald, then head of the Labour Party, threatening to murder a certain police inspector. The jury returned a special verdict to the effect that the threat was a bluff and was made to call attention to the prisoner's grievances. On his appeal against conviction, the Court of Criminal Appeal approved the trial judge's direction to the jury on the meaning of the word malicious. Darling, J., had stated: 'There are many things which a man may do which are malicious if they are done from an improper and indirect motive. . . . The word malicious to my mind implies the doing of that which a person has no legal right to do, and his doing it in order to secure some object by means which are improper'.

This interpretation of malice as signifying evil motive, with the consequent reliance on motive as the test of criminality, has been the subject of much criticism.⁴² It has been pointed out that the main object of criminal law is to prevent certain acts which are injurious to society. In order, therefore, to overcome the difficulty of proving the accused's evil motives for any given act, there arose the practice of saying that certain unlawful acts are *prima facie* to be deemed wicked actions. By resort to one of the many legal fictions in our criminal law, the wickedness inherent in the meaning of malice is inferred from the wrongful act. Of course, circumstances may exist wherein the imputation of wickedness may be removed. The important point to note is that the original interpretation by the courts of *malo animo* is still the basis of the mental element signified by the term malice and maliciously. No less an authority than Sir James Stephen has expressed the view that 'it is absolutely necessary that legal

⁴¹ 6 Cr.App.R. 257, *Coram* Lord Alverstone, C.J., Avory and Pickford, JJ. This direction was approved again in *R. v. Johnson* (1913) 9 Cr.App.R. 57. The indictment was under the Offences against the Person Act, 1861, s. 16.

⁴² See Stephen, *History of Criminal Law*, Vol. 2, pp. 120-121, and compare with his views as quoted in the text above. This apparent inconsistency is explained by Stephen when he writes that lawyers are so fully sensible of the objections to motive as the test of criminality that they overcome them by resort to the fiction explained above. The result, he goes on, is to throw upon persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the legislature, but at the same time to permit them to give evidence to that effect. See, too, Sayre, (1932) 45 *Harvard Law Review*, p. 1019; Stallybrass, *Modern Approach to Criminal Law*, p. 409.

definitions of crimes should be based upon moral distinctions, whatever may be the difficulty of ascertaining with precision what those distinctions are; and it will be found in practice impossible to attach to the words 'malice' and 'malicious' any other meaning than that which properly belongs to them of wickedness and wicked'.⁴³

2. Implied Malice

Several epithets including implied,⁴⁴ presumed,⁴⁵ inferred,⁴⁶ constructive,⁴⁷ and malice in law,⁴⁸ have been used to describe the second meaning in which the word malice is used in connection with statutory offences. Whichever adjective is used the meaning is always the same, namely, that malice, the guilty mind, is inferred from the wrongful act itself. This fiction was first enunciated in 1825 in the leading case of *Bromage v. Prosser*, where Bayley, J., said: 'There are two sorts of malice, malice in fact and malice in law, the former denoting an act done from ill-will towards an individual, the latter a wrongful act intentionally done, without just cause or excuse'.⁴⁹ Later we find a more elaborate explanation of the fiction being given by Coleridge, J., in *R. v. Weare*.⁵⁰ In that case a perfectly quiet and inoffensive bull was the object of a malicious maiming. It appeared that its owner had refused to let a field to the prisoner, but there was no evidence that the unfortunate animal had done anything to exasperate the accused. In his direction to the jury, the learned judge said that 'if it were necessary for you to be

⁴³ *General View of Criminal Law*, p. 84. In another passage, on the same page, Stephen says: 'Malicious means wicked, and its truth can be denied by no one who is not prepared to contend that the word malicious in the statute referred to (the Malicious Damage Act, 1861) is mere surplusage'.

⁴⁴ *E.g.*, *Gott v. Measures* [1948] 1 K.B. 234, at p. 239. See, too, Foster, *Crown Cases*, p. 257.

⁴⁵ *E.g.*, Sayre, *Mens Rea* (1932) 45 *Harvard Law Review*, p. 916.

⁴⁶ *E.g.*, *R. v. Shrimpton* (1840) 4 J.P. 508.

⁴⁷ *E.g.*, *R. v. Pembliton* (1874) 2 C.C.R., at p. 123.

⁴⁸ *E.g.*, *Bromage v. Prosser* (1825) 4 B. & C. 247, at p. 255.

⁴⁹ *Loc. cit.* This lead was followed by Littledale, J., in *M'Pherson v. Daniels* (1829) 10 B. & C. 263; Tindal, C.J., in *The Bristol Riots* (1832) 3 St.Tr. (N.S.) 1, at p. 8; Taunton, J., in *R. v. Haughton* (1833) 5 C. & P. 559; and Campbell, C.J., in *Ferguson v. Earl of Kinmoull* (1842) 9 Cl. & F. 321.

⁵⁰ (1840) 4 J.P. 508, tried on assize. In a footnote to the report of *R. v. Weare*, it is stated that the same principle was laid down in *R. v. Shrimpton* and tried by the same judge, which was concerned with a charge of malicious stabbing with intent to do grievous bodily harm.

satisfied of express malice, I think it would be scarcely safe to convict the prisoner. But however satisfactory it may be to a jury to have an adequate motive proved before them, and however much the absence of such motive may, in conjunction with other circumstances, weigh in favour of a prisoner, it is not necessary in point of law to prove such malice, or to give any evidence of express malice. The law will imply malice from the unlawful act itself; it is sufficient if the act be performed wilfully and wantonly'.

Considering the many centuries throughout which malice has played a prominent part in our criminal law, the doctrine of implied malice is of comparatively recent origin. Yet there is no denying the fact that it is now firmly established in the minds of the judiciary. Many cases will be found in the reports containing practically identical language to describe what is meant by implied malice. To cite only two more examples taken from cases decided, first, when the fiction was first introduced, and secondly, at the present day. In 1829, Littledale, J., in an oft-quoted sentence, said that 'malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse',⁵¹ while in 1948 we find Lord Goddard pithily stating the same idea in the words, 'if an unlawful act is done wilfully the law implies malice'.⁵²

In using such language wherein no reference is made to the *mens rea* required, the danger is that stress will be laid more and more on the doing of the unlawful act and less and less on the mind of the accused. The tendency will be to approximate the language relating to malicious crimes with that relating to crimes of absolute liability. As to the latter, 'it has been laid down over and over again', according to Avory, J.,⁵³ 'that where a statute absolutely prohibits the doing of an act it is sufficient to show that the person accused did the forbidden act intentionally and that it is not necessary to go further and show what is commonly known as *mens rea* or any intention other than to do the thing forbidden'. The similarity in language, used to describe two totally different classes of crime, is self-evident.

When it is said that the fact that the accused did the for-

⁵¹ *M'Pherson v. Daniels* (1829) 10 B. & C. 263. See, too, Blackburn, J., in *R. v. Pembrilton* (1874) 2 C.C.R., at p. 122.

⁵² *Gott v. Measures* [1948] 1 K.B., at p. 239.

⁵³ *Law Society v. United Service Bureau Ltd.* (1933) 98 J.P. 33, at p. 36.

bidden act intentionally in itself supplies *mens rea*, it is submitted that this use of the phrase *mens rea* is unreal and bound to cause confusion with its established meaning at common law. Two other points so often overlooked are, first, that the wrongful or forbidden 'act' generally consists of a number of constituent elements, and secondly, that a wrong is intentional only when the intention extends to *all* the elements of the wrong.⁵⁴ Failure to recognise or apply this rule has been one cause of several unsatisfactory decisions discussed in the section of this paper devoted to wilful crimes.

3. *Transferred Malice*

The principle of transferred malice is by no means a recent innovation. It was recognised by the old writers Hale and East, who confined themselves to its use in relation to murder and arson, both common law offences. Thus, in his *Pleas of the Crown*, Hale says⁵⁵: 'If A by malice aforethought strikes at B, and missing him strikes C whereof he dies, though A never bore any malice to C yet it is murder and the law transfers the malice to the party slain'. East extends the principle in a very wide fashion. Referring to the rule that for arson the burning must be malicious and not by mischance, he draws a distinction between two persons who accidentally set fire to a house, in the one case whilst merely shooting at game, and in the other case whilst shooting with intent to steal the game. In the first example, he says, there is no malice because the burning was by mischance. In the second example, however, the original intent to steal being felonious the party must abide all the consequences.⁵⁶

Such a wide doctrine did not commend itself to the Court for Crown Cases Reserved in *R. v. Pembliton*.⁵⁷ In that case the accused was charged under section 51 of the Malicious Damage Act, 1861, with having unlawfully and maliciously

⁵⁴ See Salmond, *Jurisprudence* (9th ed.), pp. 519-520.

⁵⁵ Vol. 1, p. 466. See, too, p. 569 for another illustration based on arson.

⁵⁶ *Pl. of Cr.*, Vol. 2, p. 1019. In *R. v. Ward* (1872) 1 C.C.R., at p. 360, Cockburn, C.J., following a somewhat similar line of argument, posed the question: 'When a man does an act malicious of itself, but without intending larger consequences, are not the limited results sufficient to make him responsible for all?'

⁵⁷ (1874) 2 C.C.R. 119. *Coram*, Lord Coleridge, C.J., Blackburn, Lush, JJ., Pigott and Cleasby, BB. In *Hall v. Richardson* (1899) 6 T.L.R. 71 the learned C.J. got confused as to the facts in *R. v. Pembliton*.

damaged a large plate glass window in the prosecutor's public house. It appeared that the prisoner was one of a large party who had been turned out of the inn for being disorderly. On reaching the street a general fight ensued from which the accused disengaged himself. Crossing to the other side of the road, he picked up a large stone and flung it at the persons with whom he had been fighting. He missed, and instead broke a window in the public house. The jury found that the accused's intention was to strike his opponents but not to break the window. Nevertheless, he was found guilty of malicious damage to property. In quashing the conviction, Lord Coleridge attempted to explain, with rather an unusual lack of clarity, the principles underlying the court's decision. Their process of reasoning, it is suggested, was along the following lines. The Malicious Damage Act and the Offences against the Person Act are concerned, respectively, with totally different species of injury; the former with damage to property, the latter with injuries to the person. Where the accused is charged with malicious damage to property and is shown to have intended to cause damage to property, malice will be implied from his intentionally doing the unlawful act. The same applies if in place of 'damage to property' we are concerned with 'injury to the person'. Where, however, the accused is charged with malicious damage to property and is shown to have intended injury to the person, or vice versa, malice will not be implied. On the other hand, where it cannot be shown that the accused intended the very kind of injury charged, but must have known that the natural consequence of his act would be to cause a different species of injury (*i.e.*, damage to property instead of injury to the person, or vice versa) and was reckless⁵⁸ whether such injury was occasioned or not, he is liable for the malicious damage or injury in fact caused. These questions being questions of fact, and the issue of recklessness as to the window never having been put to the jury in *Pembliton's Case*, the court was left with no alternative but to quash the conviction.

Four years later, in *R. v. Faulkner*,⁵⁹ a strong Irish Court

⁵⁸ This test appears in the judgments of both Lord Coleridge, C.J., and Blackburn, J., and, it is suggested, is used in the subjective sense of foresight of consequences.

⁵⁹ (1878) Ir.R. 11 C.C. 8; (1877) 13 Cox C.C. 550.

for Crown Cases Reserved disapproved the trial judge's direction to the jury which was based upon East's wide interpretation of the doctrine of transferred malice. The accused was charged with maliciously setting fire to the *Semindar*, a ship carrying a cargo of rum, sugar and cotton worth £50,000. The prisoner, a member of the ship's crew, went into the hold for the purpose of stealing some rum. Unfortunately for himself, and the shipowners, he went about his task clumsily. In lighting a match to see what he was doing the rum caught fire, which soon enveloped and destroyed the entire ship. It was conceded that the accused had no actual intention of burning the vessel, but the jury were directed to find him guilty if they found that the fire originated whilst he was engaged in committing the felony of stealing rum. As East put it, 'the original intent being felonious the party must abide all the consequences'. On this direction a verdict of guilty was inevitable. It is fairly obvious that the decision in *R. v. Pembliton* was not known to at least one member of the Irish bench, for not until the second hearing of the appeal did the trial judge add a paragraph to his stated case adverting to the question of recklessness. Even then he makes the surprising statement that he 'was not asked to leave any question to the jury as to the prisoner's knowing the probable consequences of his act, or as to his reckless conduct'. With one dissenting voice, the full court rejected the trial judge's ruling on the application of transferred intent.

Further approval for the principles enunciated in *R. v. Pembliton* was given in the equally well-known case of *R. v. Latimer*.⁶⁰ Once again the scene took place in a public house with the unfortunate proprietor as the victim. The prisoner, in aiming a blow with his belt at his adversary, only managed to strike him slightly. The belt bounced off and struck the proprietress, who was standing talking to the person assailed, cutting her face open and wounding her severely. The accused was charged under the Offences against the Person Act, 1861, s. 20, with maliciously wounding the proprietress. In answer to a question left them by the trial judge, the jury found that the striking of the prosecutrix was purely accidental and not such a consequence as the prisoner ought to have expected. Neverthe-

⁶⁰ (1886) 17 Q.B.D. 359.

less, the judge directed a finding of guilty, which was upheld by the Court for Crown Cases Reserved.⁶¹

The question naturally asked is how can the two decisions in *R. v. Pembliton* and *R. v. Latimer* be distinguished. The answer is dependent on the kind of injury intended and also the kind of injury in fact occasioned. Where, as in *Latimer*, A does an unlawful act intending to injure B's person but accidentally injures C's person, the express or implied malice against B is transferred against C. The species of injury is the same, namely, injury to the person, therefore the fact that A could not have foreseen the injury to C is immaterial. Where, as in *Pembliton*, A does an unlawful act intending to injure B's person but accidentally damages C's property, the express or implied malice against B's person is not transferred against C's property, unless it can be shown that A was reckless as to the damage to C's property.

Little thought seems to have been given to determining the limits of this convenient theory. One of the principal questions that suggests itself is this. Where the ultimate injury caused is of the same species as that originally intended, is a person to be held responsible however extended the chain of events which follow upon his unlawful act? Or is there to be introduced a set of rules similar to those on remoteness of damage in the law of tort. Take the following hypothetical situation. The defendant, annoyed with his bull, thrusts a pitchfork into its side. Incensed, the bull runs amok causing widespread damage, finally entering a prefabricated house where it upsets a table lamp resulting in the house being set on fire. Both kinds of damage, to the bull and the prefabricated house, fall within the Malicious Damage Act and are, therefore, presumably, to be considered the same species of injury to which the rule of transferred malice applies. A glance at the sections in that enactment will indicate at once the widely different variety of things which are protected under the general heading of malicious damage to property. Fact is stranger than fiction is an old saying, and if the doctrine of transferred malice is as wide as seems apparent, it is impossible to conceive the strange turns through which the wheel of responsibility will lead a wrongdoer.

⁶¹ Consisting of Lord Coleridge, C.J., Lord Esher, M.R., Bowen, L.J., Field and Manisty, JJ.

4. General and Particular Malice

Finally, there occasionally appears in the reports the terms 'general' and 'particular' malice. Particular malice is used to describe the special form of statutory malice required; for example, under the Malicious Damage Act, 1861, the adjective refers exclusively to malicious damage to property.⁶² General malice, on the other hand, is the phrase used by some judges to explain the principle of transferred malice. An instance of such use may be found in Lord Coleridge's judgment in *R. v. Latimer* when he said ⁶³: 'It is common knowledge that a man who has an unlawful and malicious intent against another and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act and has that which the judges call general malice, and that is enough'.

This alternative description of what is generally described as transferred malice is both inappropriate and unnecessary. Indeed, it is doubtful where there exists any necessity for the term 'general malice'. At any rate, it is suggested that the adjective 'general' should have a wider application and be synonymous with what Professor Kenny describes as 'universal malice'. He uses it in relation to malice aforethought, saying it describes the case of a man who intends to kill, but who does not select any particular individual as the victim. In the case of statutory crimes, 'general' or 'universal' malice would describe the state of mind of a man bent on causing damage or injury to property or persons in general, having no particular individual or item of property as his prospective target.

CLAIM OF RIGHT IN MALICIOUS CRIMES

So much for the different senses in which the term malice is applied. The necessity for *mens rea* is universally accepted, though, as we have seen, there are certain dangers to be avoided, and some uncertainties still to be resolved. We must now turn our attention to another practical problem, namely, the significance of a bona fide claim of right in statutory crimes involving malice. To what extent does the existence of such a claim of

⁶² See Bowen, L.J., in *R. v. Latimer* (1886) 17 Q.B.D., at p. 362, and Blackburn, J., in *R. v. Pembliton* (1874) 2 C.C.R., at p. 120.

⁶³ At p. 361.

right rebut proof of *mens rea*? This question has become of topical interest since the recent decision of the divisional court in *Gott v. Measures* (1948), which we shall examine in a moment.

At once, let us get quite clear in our minds the two different rôles in which a claim of right appears. It may serve either as a ground for ousting the magistrates' jurisdiction, or as a complete defence. The difference between these two functions is that where the plea of ouster of jurisdiction is successfully raised the magistrates merely refrain from adjudicating, whereas in cases where a claim of right is upheld as a defence the accused is completely acquitted. Another difference, of course, is that the plea of ouster may only arise in cases which are heard before a court of summary jurisdiction, whereas the defence of claim of right may be raised and determined by any court hearing a criminal trial. The importance of keeping the two rôles separate will become apparent when we discuss the rules governing claim of right as an ouster and as a defence respectively. The danger arises when the line of demarcation is either forgotten or ignored. Let us examine both rôles in turn.

Claim of Right as an Ouster of Jurisdiction

Such a plea may rest on either the common law or special statutory provision. Taking first the position at common law. In order to set up successfully a claim of right which will *oust the jurisdiction of the justices* it is necessary first to show that the right can exist in point of law and that it relates to a question of title to real property. It follows that if the right claimed is not within that class of rights which are recognised as being maintainable in point of law the jurisdiction is not ousted, and the magistrates may proceed to try the case.⁶⁴ The artificial results obtained by applying these rules can best be judged by comparing the case of A, who claims a right as one of the public to fish in the non-tidal part of a river, and B, who claims a similar right in respect of the tidal river. The law only recognises a public right to fish in that part of a river which is regarded

⁶⁴ This rule was laid down as early as 1700 in *R. v. Speed*, 1 Ld. Raym. 583 and repeated in *Calcraft v. Gibbs* (1792) 5 Term. Rep. 19. It was upheld by Blackburn, J., in *Cornwell v. Sanders* (1862) 32 L.J.M.C. 6 and in *Hudson v. MacRae* (1863) 33 L.J.M.C. 65. A full discussion of the limitations of the rule appears at pp. 1899-1903 in the recently published 10th ed. of Russell on *Crime*.

as the tidal reach; consequently a difference in the *locus in quo* which may be a matter of yards only will enable B to succeed where A must fail.⁶⁵ Assuming the right claimed is maintainable in law, the next question for the justices is to decide whether the claim is honest and bona fide. Only if satisfied on this point also, will the summary jurisdiction be finally ousted.

It is, of course, open to the legislature to modify or curtail the common law rule. Concerned as we are with statutory crimes of malice it is to be noted that throughout the Malicious Damage Act, 1861, only one section provides expressly for a claim of right as an ouster of summary jurisdiction. That section, section 52, creates the residuary summary offence of wilfully or maliciously injuring any real or personal property in any circumstances not expressly provided for elsewhere in the Act, and declares that the section shall not apply 'where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of'.⁶⁶ Three points need stressing here. First, this proviso does not constitute a defence in the true sense of the word—it is concerned with ouster of the magistrates' jurisdiction; secondly, it is confined to charges arising under section 52; thirdly, in its restricted application it supersedes the common law rule as to bona fide claim of right as an ouster.

The third point appears clearly from the judgment of Blackburn, J., in *White v. Feast*,⁶⁷ who said that a man may be convicted of maliciously doing an injury under section 52, if, although he acted with a bona fide claim of right, he had no fair and reasonable ground for his supposition. As he put it, where 'the proviso expressly says that the claim of right must be founded on reasonable grounds the ordinary proviso, usually implied as to mere bona fides, is superseded'.⁶⁸

To sum up, whether the accused bases his plea of ouster on

⁶⁵ Cf. *R. v. Stimpson* (1863) 32 L.J.M.C. 208 (tidal river) with *Hudson v. MacRae* (*supra*) (non-tidal river).

⁶⁶ The same proviso is to be found in the Criminal Justice Administration Act, 1914, s. 14, but that section only repeats the substantive offence created in section 52 of the Malicious Damage Act, differentiating the punishment awardable according to the amount of damage occasioned.

⁶⁷ (1872) L.R. 7 Q.B. 353.

⁶⁸ *Ibid.*, pp. 359–360, with which view Cockburn, C.J., Mellor and Quain, JJ., concurred. See, too, *Brooks v. Hamlyn* (1899) 63 J.P. 215; *Heaven v. Crutchley* (1903) 68 J.P. 53; and *R. v. Crowley* (1909) 100 L.T. 441.

a bona fide claim of right or a fair and reasonable supposition of right, will be determined according to the section of the Malicious Damage Act under which he is charged. Two obstacles must be successfully surmounted. The first is the same in both cases, namely, that the right is capable of existing in law. The second differs according to the basis of the defendant's plea. To a charge under section 52 the accused must show that his supposition was fair and reasonable judged by an objective standard; to a charge under any other section, the accused must show that he honestly and bona fide believed his claim of right to justify his action, the test here being subjective.

This discussion on ouster of jurisdiction has been introduced deliberately to point out that the law governing claim of right as a ground for ouster is totally independent of the law relating to claim of right as a defence. Ouster of jurisdiction is a matter of criminal procedure, whereas the validity of a defence to a criminal charge is a matter of substantive law. The question of *mens rea* does not arise when a plea of ouster is raised, whereas it is the vital issue when claim of right is pleaded as a defence. Therefore, when it is said that summary jurisdiction will only be ousted if the right claimed is maintainable in law, it does not follow that the same rule applies where a claim of right is put forward as a defence.

Claim of Right as a Defence

When we turn to consider the second role in which a claim of right appears, namely, as a defence, we are concerned solely with the common law. Unfortunately, confusion still exists on the crucial point of what is the governing test. It is submitted that in any case where claim of right is put forward *as a defence* to a statutory crime involving malice, the question is not whether the right is maintainable in law or not, but whether the accused himself honestly believed he had a right to do what he did. The reasonableness of the claim of right and of the steps taken to protect or enforce the right is a factor, but not the deciding factor, in determining whether the accused acted in good faith.

It will be well to examine the cases for and against the view put forward. One of the earliest exponents of the subjective test was Lord Abinger in *R. v. James*⁶⁹. A dispute had arisen

⁶⁹ (1837) 8 C. & P. 131, a case arising under 7 & 8 Geo. 4, c. 30, s. 6.

between the owners of adjoining mines and one of the owners, asserting that a certain airway belonged to him, directed his workmen to stop it up. The accused acting bona fide, and believing his employer to have a right to do so, assisted with the work and was duly charged with maliciously obstructing the airway. In the course of his summing up, Lord Abinger said ⁷⁰: 'If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so acting bona fide, I am of the opinion that that is not a felony *in them* even if in so doing they obstruct the airway of a mine'. The same eminent judge was concerned with the case of *R. v. Day*,⁷¹ in which the accused was charged with maliciously maiming and wounding four sheep belonging to his neighbour. The sheep having trespassed on his land, the prisoner impounded them and demanded compensation. On his neighbour refusing to do so, the accused said: 'Very well then, I'll go and prosecute the sheep and you shall not see them any more'. Lord Abinger left it to the jury to say whether the prisoner had acted maliciously or whether he had maimed the sheep under a mistaken claim of right to do the act complained of, for 'it was no offence within the statute ⁷² for a man to do an act which he conceived *himself*, however erroneously, to be justified by his rights in carrying into execution'. The accused was found not guilty.

In *R. v. Mathews and Twigg*,⁷³ another case of maliciously stopping up an airshaft, we find Brett, J., saying that where the act charged is done under a bona fide claim of right, it is not done maliciously. Insomuch as the evidence showed that the prisoner did the act after notice and openly, it was, he said, 'preposterous to say that he did it otherwise than under a bona fide claim of right. Whether he had a right or not must be tried in a civil court'. In other words, it is the good faith of the accused and not the right itself which is of prime consideration. Perhaps the best known among this series of cases is *R. v. Twose*,⁷⁴ in which the accused was charged with having

⁷⁰ (1837) 8 C. & P. 131, at p. 133. See, too, Lord Denman's judgment in *James v. Phelps* (1840) 11 A. & E. 483, at p. 489, in which the direction of Lord Abinger (*supra*) was approved.

⁷¹ (1844) 8 J.P. 186.

⁷² This was the consolidating statute of 1827 (7 & 8 Geo. 4, c. 30), upon which was based the Malicious Damage Act, 1861.

⁷³ (1876) 14 Cox C.C. 5.

⁷⁴ (1879) 14 Cox C.C. 327.

maliciously set fire to some furze growing on a common. Her defence was that persons living near the common had occasionally burnt the furze to improve the growth of the grass, and she bona fide believed that she had a right to do likewise. In fact, no such right existed, but as Lopes, J., said, 'If she set fire to the furze thinking she had a right to do so that would not be a criminal offence'. The defendant was acquitted.

These cases, it is submitted, in which claim of right was put forward *as a defence*, show that the judges were not at all concerned with the legality or otherwise of the right under which the accused purported to act. In each case the decision hinged around the question whether the claim of right was honestly and bona fide held by the prisoner. That question is essentially one of fact. When we turn to examine the decision in *Gott v. Measures*,⁷⁵ it is with considerable surprise that we read of the Divisional Court rejecting the accused's plea of a claim of right on the ground that the right was one which the law did not recognise. We have seen that in cases where the issue is one of ouster of jurisdiction, it is necessary to show that the right claimed was maintainable in law. But in *Gott v. Measures* that was not the issue before the court; instead, the question was whether a bona fide claim of right was a valid defence. How then can the decision be justified, particularly having regard to the body of authority discussed above?

Let us look at the case a little closer. The accused was charged with maliciously killing a dog which was trespassing on land over which he had the full sporting rights. Having first torn a hen pheasant to pieces, the dog was chasing a hare when it was shot dead by the accused. Its owner had been warned several times about the dog trespassing. Lord Goddard felt no doubt as to the law which, he said, justified a person shooting a dog provided 'he honestly believes that it is necessary as being the only way in which he can protect his property'.⁷⁶ Insomuch as the accused only had the sporting rights he had no property in the land nor in the game. His position in relation to wild game was identical with that of a landowner, neither had any property in the hare until he had shot it and taken it. Therefore, Lord Goddard concluded: 'Just as you cannot have a bona

⁷⁵ [1948] 1 K.B. 234.

⁷⁶ *Ibid.*, p. 239.

fide claim of right if the right is one which the law does not recognise, so it seems to me you cannot honestly believe that it is necessary to shoot a dog to protect your property when you have no property'.⁷⁶ If the decision is correct, every landowner is amenable to a criminal charge every time he shoots a marauding dog which comes on his land in search of *live* wild game. Let the pheasant or the hare be dead before the landowner shoots and he can then plead a bona fide claim of right. Surely this is a remarkable interpretation of the law.

It is submitted that the Lord Chief Justice's views are based upon several fallacies. First, that a claim of right is *only* maintainable where the accused has acted in defence of his property.⁷⁷ No such limitation is provided by statute or at common law. Take the case of a person who kills a dog under the honest belief that he had received instructions from its owner to destroy the animal. There is no law which prevents him from successfully pleading a bona fide belief of his right to act as he did. Secondly, that if the accused has in fact acted in defence of his property the claim of right will only be deemed bona fide if he can show there was no other way of doing so. This view has been rejected by the Court of Appeal in two recent decisions, *Cresswell v. Sirl*⁷⁸ and *Hamps v. Darby*,⁷⁹ which require a person who shoots a marauding animal to prove no more than reasonable necessity for his act.⁸⁰ Finally, that a claim of right is only available if the right is one which the law recognises. It has already been pointed out that this may well be true in regard to a plea of ouster of jurisdiction, but, it is submitted, there is no such sweeping restriction so far as the common law defence is

⁷⁷ See (1948) 64 *Law Quarterly Review*, p. 39, for an excellent criticism of *Gott v. Measures*, based upon this particular ground.

⁷⁸ [1948] 1 K.B. 241, 249. It is interesting to note that in *Goodway v. Becher* (1951) 95 Sol. Journal 239, a case arising also under section 41 of the Malicious Damage Act, 1861, Lord Goddard has brought his views into alignment with those of the Court of Appeal, stating: 'The question was not whether the defendant had taken all possible steps but whether he had acted reasonably. The law has been correctly stated by Scott, L.J., in *Cresswell v. Sirl*'.

⁷⁹ [1948] 2 K.B. 311.

⁸⁰ As Wrottesley, L.J., said ([1948] 2 K.B., at p. 330): 'The burden of establishing the negative proposition that there was no practicable means of saving the stock or crop under attack except by shooting (that is, to kill) may become a very difficult, or even impossible, one to discharge. Strictly, all the farmer can usually say is "I could not think on the spur of the moment of any alternative that was likely to be effective". Beyond that, all is likely to be surmise'.

concerned. The essence of a bona fide claim of right is that it rebuts any presumption or proof of *mens rea*. In the case of malicious injuries that *mens rea* is malice; in the case of larceny that *mens rea* is *animus furandi*, an intent to deprive the owner permanently. The definition of larceny in the Larceny Act, 1916,⁸¹ which is declaratory of the common law, expressly provides that 'a claim of right made in good faith' shall be a defence. Furthermore, it has been held by the Court of Criminal Appeal in *R. v. Bernhard*,⁸² that an unbroken chain of authority supports the principle that 'a person has a claim of right within the meaning of the section if he is honestly asserting what he believes to be a lawful claim, even though it be unfounded in law or in fact'.⁸³ If that is so, why should the common law be different—as was suggested in *Gott v. Measures*—when a bona fide claim of right is pleaded as a defence to crimes requiring *mens rea* in the form of malice?

It is worth noting that none of the cases discussed earlier, in which the subjective test was applied, was apparently cited to the court in *Gott v. Measures*.⁸⁴ On the other hand, occasion was taken to doubt the correctness of Lord Coleridge's interpretation of the law in *Daniel v. James*,⁸⁵ in which that judge said that section 41 of the Malicious Damage Act does not apply to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given. Such a rule, it was felt, was too wide. Reference was made to an earlier opinion⁸⁶ that the defence would not apply if the accused knew that much less violent measures would attain his object. This may well be

⁸¹ Section 1 (i).

⁸² (1938) 26 Cr.App.R. 137.

⁸³ *Ibid.*, p. 144, *per* Charles, J. One of the earliest instances of this principle, not cited in *Bernhard*, is *R. v. Hall* (1828) 3 C. & P. 409.

⁸⁴ Nor, it would seem, were they cited in *Miles v. Hutchings* [1903] 2 K.B. 714, which case the court in *Gott v. Measures* purported to follow. Since this lecture was delivered, the 10th edition of Russell on *Crime* has been published. The learned editor, Mr. J. W. C. Turner, criticising *Gott v. Measures* (at pp. 1662–1665), draws the same distinction (*supra*) between claim of right as an ouster and as a defence, and reaches the same conclusion as above, *viz.*, that where the defendant's belief is put forward as a defence 'he may in law . . . put forward a bona fide claim of a supposed right which the law does not recognise'.

⁸⁵ [1877] 2 C.P.D. 351, at p. 353. This case was followed, albeit grudgingly, in *Smith v. Williams* (1892) 56 J.P. 840. Compare, too, *Bryan v. Eaton* (1875) 40 J.P. 213.

⁸⁶ Wills, J., in *Miles v. Hutchings* (*supra*), at p. 717.

true, but is not the position this, that the steps taken to uphold a claim of right are evidence, nothing more, which the jury must take into consideration when deciding the question of the accused's good faith? Certainly this was the attitude adopted by a very strong court in *R. v. Clemens*.⁸⁷ If this conclusion is correct, it seems to me that Lord Coleridge's language is fully in accord with the common law, and follows the earlier authorities in holding that the governing test of a bona fide claim of right is subjective.

WILFULNESS

Our next task is to determine what part the basic principle of criminal law, that no man is guilty unless he has a guilty mind, plays in statutory offences based upon wilful conduct. We shall see that, as with crimes involving malice, there is some confusion among the judges as to the answer to this problem. It will be my purpose to show that the fundamental rule regarding *mens rea* is implied in every statutory offence containing the word 'wilfully', and furthermore, that in every such offence a bona fide mistake or claim of right is a good defence.

The list of enactments in which the terms 'wilful' or 'wilfully' appear is very varied, including the Vagrancy Act, 1824,⁸⁸ the Perjury Act, 1911,⁸⁹ the Larceny Act, 1861,⁹⁰ and the Solicitors Act, 1932.⁹¹ One of the earliest criminal statutes to use the word 'wilfully' was the Black Act, 1723, which is of added interest because it used the term in conjunction with the word 'maliciously', making it a felony (*inter alia*) to 'wilfully and maliciously shoot at any person'. This coupling of the terms is unusual,⁹² but occasionally they are found as alternative

⁸⁷ [1898] 1 Q.B. 557 (*Coram*, Lord Russell of Killowen, C.J., Grantham, Wright, Bigham and Darling, JJ.), in which it was suggested that a proper direction to the jury would be that 'if on the facts before them, the jury came to the conclusion that the defendant did more damage than they could reasonably suppose to be necessary for the assertion and protection of that right, then the jury may properly and ought to find the defendant guilty of malicious damage'.

⁸⁸ *E.g.*, section 3.

⁸⁹ *E.g.*, section 1 (1).

⁹⁰ *E.g.*, section 23.

⁹¹ Section 46. Other statutes in which the term appears include the Children and Young Persons Act, 1933, s. 1 (1); Offences against the Person Act, 1861, ss. 26 and 35; Companies Act, 1948, s. 71.

⁹² Another example of its use is to be found in the Conspiracy and Protection of Property Act, 1875, s. 4, which deals with the wilful and malicious

conditions of liability, a good illustration of the latter practice being seen in section 52 of the Malicious Damage Act, 1861, which extends to persons 'wilfully or maliciously causing damage'.⁹³

The meaning attributed to the word 'wilfully', where it appears in statutory offences, depends largely on the attitude adopted towards the question of *mens rea*. Thus, the construction given by a court which treats such offences as crimes of absolute liability will be totally different from that given where the court considers such offences to require proof of a guilty mind. That there should be such a wide cleavage of opinion on the meaning of such an elementary expression is due, I suggest, to three causes. First, to the trend of thought which happens to be current at the time when a particular case is decided; secondly, to the individual judge's attitude towards this vital principle, and thirdly, to the spurious meaning sometimes given to the expression *mens rea*.

Which of the opposite points of view is correct? We must find our answer from the language used by the courts, and it is proposed to take each of the respective points of view in turn.

1. *That in offences which include the term 'wilfully', it is necessary to prove 'mens rea'*

The most recent case to deal with this problem, *Young-husband v. Luftig*,⁹⁴ shows the Divisional Court of five judges⁹⁵ upholding the view that where the word 'wilfully' appears in a statutory offence, a guilty mind must be shown. The

breach of contract of service by persons employed by municipal authorities etc. in the supply of gas or water. There are occasions, too, when the two words have been considered interchangeable. Thus, in *Cox's Case*, 1 Leach 71, the accused was charged with perjury at common law, the indictment alleging that the offence was committed 'falsely, maliciously, wickedly and corruptly'. It was held by all the judges that those words implied that it was done wilfully. On the other hand, in *Davies's Case*, 2 Leach 556, the indictment, under the Black Act, 1723 (*supra*), read 'unlawfully, maliciously, and feloniously' but omitted the word 'wilfully'. The indictment was held to be invalid by a majority of the judges, who considered that the words 'wilfully and maliciously' were descriptive of the offence created by the statute; and that they were bound by former precedents in analogous cases (citing *Lembro v. Hamper*, Cro.Eliz. 147), however the sense and legal import of the words might be the same.

⁹³ For another instance see Perjury Act, 1911, s. 12 (1) (b).

⁹⁴ [1949] 2 K.B. 354.

⁹⁵ Lord Goddard, C.J., Oliver, Birkett, Lynskey and Sellers, JJ.

case arose out of an information preferred by the Medical Defence Union charging the accused with wilfully and falsely using the description 'M.D.' thereby implying that he was registered under the Medical Act, 1858.⁹⁶ It was admitted by the accused that his qualification, as a doctor of medicine of Berlin University, did not entitle him to be, and that he was not in fact, registered under the Act of 1858. Until 1944, Luftig had described himself, on his notepaper and professional plate, as 'M.D. Berlin' but, after certain unpleasant incidents, had abbreviated this to 'M.D. BLN' so as to conceal the fact that his degree was obtained in Germany. The justices were satisfied that the degree diploma, produced by the accused, had been granted by a genuine university. The question before the court, therefore, was whether the accused had used the description 'doctor of medicine' wilfully and falsely, thereby implying that he was a registered medical practitioner. The magistrates answered the question in the negative and dismissed the information, from which verdict the Medical Defence Union appealed. Lord Goddard, delivering the unanimous judgment of the divisional court, cited nine earlier cases⁹⁷ decided between 1860 and 1899, from which, he said,⁹⁸ 'It will be seen that there is an unbroken line of authority—that to commit an offence (under section 40) the defendant must have acted wilfully and falsely, and that it is for the magistrates to decide whether he has done so; also that he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did. He must, of course, have a reasonable ground for his belief'. Summing up the court's view on the meaning of 'wilfully and falsely', the Lord Chief Justice said,⁹⁸ 'There must be

⁹⁶ This is made a summary offence under section 40 of the Medical Act, 1858, which provides that: 'Any person who shall wilfully and falsely pretend to be or take or use the Name or Title of a Physician, Doctor of Medicine, Licentiate in Medicine and Surgery, Bachelor of Medicine, Surgeon, General Practitioner or Apothecary, or any Name, Title, Addition or Description implying that he is registered under this Act . . . shall, upon a summary conviction for any such offence, pay a sum not exceeding Twenty Pounds'. By the Medical Act, 1950, s. 28, the penalty is increased from £20 to £500. Similar provisions are to be found in the Veterinary Surgeons Act, 1881, s. 11, and the Dentists Act, 1878, s. 3. In the latter enactment, however, the term 'wilfully' is omitted.

⁹⁷ *Ladd v. Gould* (1860) 1 L.T. 325; *Ellis v. Kelly*, 6 H. & N. 222; *Andrews v. Styrrup*, 26 L.T. 704; *Carpenter v. Hamilton* (1877) 37 L.T. 157; *Davies v. Makenna* (1885) 29 Ch.D. 596; *R. v. Aston Justices* (1891) 8 T.L.R. 123; *Steel v. Ormsby* (1894) 10 T.L.R. 483; *R. v. Lewis*, 12 T.L.R. 415; *Humber v. Clare* [1899] 1 Q.B. 635.

⁹⁸ *Ibid.*, p. 369.

mens rea, and the presence or absence of that state of mind must be tested on ordinary principles and in the light of common sense'.

The disparity shown by different judges in interpreting the same statutory offence is well illustrated by reference to the earlier decision of the Divisional Court in *Jutson v. Barrow*.⁹⁹ In that case, Lord Hewart, with whose views on *mens rea* we shall have special occasion later to be concerned, referred to section 40 in these words: 'What is regarded is not the mind of the individual but the meaning likely to be conveyed by the words that are used'.¹ Humphreys, J., speaking in the same strain, stated that 'the prohibition against the use of the named words and titles or of any other titles having the same implication is absolute'.² This construction of the offence as one of absolute liability, in spite of the words 'wilfully and falsely' expressly inserted by the legislature, was, it is suggested rightly, disapproved of by the court in *Younghusband v. Luftig*.³

Many other cases will be found in the reports in which, whenever the offence depends upon the accused's conduct being wilful, *mens rea* has been held to be an essential element. In a case in 1856, *R. v. Badger*,⁴ we find Lord Campbell, C.J., quoting Milton⁵ in support of the view that 'wilful' denotes 'evil intention',⁶ and consequently where the accused had acted

⁹⁹ [1936] 1 K.B. 236. *Coram*, Lord Hewart, C.J., Humphreys and Singleton, JJ.

¹ *Ibid.*, p. 241.

² *Ibid.*, p. 248.

³ No doubt was expressed as to the correctness of the decision in *Jutson v. Barrow*, having regard to the particular facts in that case. The only member of the court in the latter case to even mention the words 'wilfully and falsely' was Singleton, J., and then only in passing. (See p. 252).

⁴ (1856) 25 L.J.M.C. 81, turning on the Metropolitan Buildings Act, 1844, s. 79.

⁵ 'Thou to me
Art all things under heav'n, all places thou
Who for my wilful crime art banish'd hence'.

Paradise Lost, Book 12 l. 617-619.

⁶ The interpretation 'evil mind' was also adopted by Brett, J., in *R. v. Prince* (1875) 2 C.C.R. 154, at p. 161, when he said: 'Wilfully is more generally applied when the prohibited acts are in their natural consequences not necessarily or very probably noxious to the public interest, or to individuals; so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a *prima facie* case, than evidence that the prisoner did the prohibited acts'.

under an honest mistake he could not be convicted of 'wilfully receiving a higher fee than that to which he was entitled'. This meaning of the term 'wilful' was approved by Coleridge, and Erle, JJ., the other members of the court. In another case, *Smith v. Barnham*,⁷ the accused was charged with wilfully throwing rubbish into a certain river. The defendant, a tanner, had occupied the same premises for nearly twenty years and had constantly discharged refuse from his works into the same river. Referring to the epithet 'wilfully', Bramwell, B., said he greatly doubted whether the defendant's conduct constituted a wilful throwing-in of rubbish within the statute. 'What was done here', he added, 'was done in the exercise of a supposed right, and the Act seems to me to point to a knowingly wrongful act on the part of the doer'. The same attitude was shown in a case⁸ which arose under the Vagrancy Act, 1824, s. 3 of which makes it an offence if a person, being able to maintain himself, his wife, and family, wilfully refuses or neglects to do so. It was held that the accused, who bona fide believed his wife to have committed adultery and had therefore refused to support his spouse, was not guilty of wilfully refusing to do so. In other words, the term wilfully signifies *mens rea* which, by reason of his bona fide belief, the accused did not have.

Each of the above cases, I suggest, represents sound common sense, achieved by regarding the word 'wilfully' as the key which sets in motion the old maxim *actus non facit reum nisi mens sit rea*. There are other cases⁹ and dicta¹⁰ upholding the

⁷ (1876) 34 L.T. Rep. 774.

⁸ *Morris v. Edmonds* (1897) 77 L.T. 56. See, too, *Flannagan v. Bishopwearmouth* (1857) 8 E. & B. 451. Cf. the recent civil case of *Allen v. Allen* [1951] 1 All E.R. 724 (C.A.), in which, on a claim against a husband for wilfully neglecting to provide reasonable maintenance for his wife, it was held that once the alleged adultery of the wife had been the ground of a petition for divorce which had failed, the husband was no longer entitled to resist the wife's claim for maintenance on the ground that he bona fide and on reasonable grounds believed she had committed adultery. The Master of the Rolls (at p. 731) defined 'an honest and reasonable belief' as 'a belief that is sensible and not the result of caprice, or stubborn and distorted judgment'.

⁹ E.g., *Steele v. Midland Railway Co.* (1869) 21 L.T. 387, 392, and the recent case of *Eaton v. Cobb* [1950] 1 All E.R. 1016, which turned on the interpretation of the Highway Act, 1835, s. 72, which makes it an offence (*inter alia*) 'in any way wilfully' to 'obstruct the free passage of any highway'.

¹⁰ See *Swinfen v. Bacon* (1861) 6 H. & N. 846, *per* Cockburn, C.J., at pp. 848, 849; more recently, see *Reynolds v. G. H. Austin & Sons, Ltd.* [1951] 1 All E.R. 606, *per* Devlin, J., at p. 613.

same principle but, for the moment, let us leave this school of thought and move on to consider the alternative point of view.

2. *That in offences which include the term 'wilfully' the accused's state of mind is irrelevant*

It has always been accepted that where the legislature has created, either expressly or impliedly, an offence of absolute liability, it is irrelevant to inquire into the defendant's state of mind. In such crimes, proof of a guilty mind is not necessary, and all that is required of the prosecution is to show that the accused intentionally did the prohibited act. Some judges have gone so far as to say that this in itself 'gives full scope to the doctrine of *mens rea*'.¹¹ This meaning of the expression *mens rea* is, as suggested earlier, spurious and unreal, but it is important to note the fact that it is used. Another way of expressing the same idea is to say that 'the prisoner had done the thing which was forbidden by the statute and that it was not necessary to prove any further *mens rea*'.¹²

In neither case, from which these dicta are extracted, did the word 'wilfully' appear in the statutory offence before the court; in both cases the offence in question was deemed to be one of absolute liability. Yet we find the same language being used by some judges in relation to crimes based upon wilful conduct. Thus, for example, in *The Law Society v. United Service Bureau Ltd.*,¹³ the defendant company were charged with wilfully pretending to be qualified to act as a solicitor, contrary to the Solicitors Act, 1932, s. 46. To counsel's submission that the word 'wilfully' involved some *mens rea*, Avory, J. replied¹⁴: 'I am satisfied that the wilful pretence is satisfied by evidence that the person accused intentionally did that which the Act forbids', and later, in the same passage, he declared that 'it is not necessary to go further and show what is commonly known as *mens rea*, or any intention other than do the thing forbidden'. If this is correct, the offence is one of absolute

¹¹ *R. v. Prince* (1875) 2 C.C.R. 154, *per* Bramwell, B., at p. 175.

¹² *R. v. Maughan* (1934) 24 Cr.App.R. 130, *per* Avory, J., at p. 132. See, too, the same judge in *R. v. Wheat* [1921] 2 K.B., at p. 126. Surprisingly, the latest advocate of this meaning of *mens rea* is Lord Goddard, C.J., in *Kat v. Diment* [1950] 2 All E.R., at p. 661, and again in *Lamb v. Sunderland and District Creamery Ltd.* [1951] 1 All E.R., at p. 923.

¹³ (1934) 98 J.P. 33.

¹⁴ *Ibid.*, p. 36. Charles and Lawrence, JJ., agreed with all that Avory, J., said on the question of *mens rea*.

liability and, therefore, to all intents and purposes, the word 'wilful' in the section is superfluous. It will be recalled that a similar interpretation was adopted by Lord Hewart in relation to section 40 of the Medical Act, 1858, but this was strongly criticised in *Younghusband v. Luftig*. Having regard to the decision in the latter case, it is submitted that the interpretation of Avory, J., above, is likewise no longer tenable.

This leads us to consider section 23 of the Larceny Act, 1861,¹⁵ out of which has arisen a series of cases calculated to dampen the most ardent advocate of our criminal law. This section deals with the unlawful and wilful killing, wounding or taking of any house pigeon. Insomuch as all the earlier authorities were discussed in *Cotterill v. Penn*,¹⁶ it is a convenient starting point for our discussion. In that case it appeared that the defendant was in his garden with the intention of shooting wild pigeons and magpies which had been damaging his crops. There was brilliant sunshine at the time, partly dazzling the accused. Suddenly he saw a solitary pigeon flying low. It remained visible for only a few yards before he shot it and killed it. Unfortunately, it was a house pigeon. The justices found that the accused honestly thought it was a wild pigeon, and that in shooting it he was exercising his right of protecting his crops from imminent danger. Both defences were held by the divisional court to be inapplicable.¹⁷ It was admitted that if the accused could show a lawful excuse for his shooting his act would cease to be unlawful, and, therefore, outside the section. Lord Hewart was of the opinion, however, that it would be an undue straining of the authorities to say that an apprehension of danger is a lawful excuse.¹⁸ As we have seen, that view is no longer in keeping with the law recently laid down by

¹⁵ The full section reads: 'Whosoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction etc.'.

¹⁶ [1936] 1 K.B. 53. *Coram*, Lord Hewart, C.J., Avory and Humphreys, JJ.

¹⁷ It is interesting to note that under the Defence (General) Regulations, 1939, Reg. 9, it was made an offence *knowingly* to kill, wound or take a racing or housing pigeon. The word 'knowingly' was subsequently omitted, but a proviso was added which made it a good defence for the defendant to prove that he acted under the reasonable belief that the pigeon was not a racing or housing pigeon and that he forthwith handed it over to the authorities. This offence has since been revoked under the provisions of S.R. & O. 1945, No. 504.

¹⁸ *Ibid.*, p. 61.

the Court of Appeal in *Cresswell v. Sirl*¹⁹ and *Hamps v. Darby*.²⁰ On this ground alone, it is suggested, the case of *Cotterill v. Penn* would be decided differently today.

Turning to the question of *mens rea* in relation to section 23 the then Chief Justice said that the state of mind of the person charged was irrelevant, and that the element of *mens rea* was not required beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden.²¹ Here, once more, we find an offence based upon wilful conduct interpreted in language peculiar to crimes of absolute liability. It follows the same pattern as that used by the same judge in construing section 40 of the Medical Act, 1858,²² and rightly disapproved in *Luftig's Case*. The same strictures, it is suggested, should apply to the interpretation of 'wilfully' given in *Cotterill v. Penn*.

What of the other cases which have arisen under section 23? To what extent have they considered the term 'wilfully' to require proof of *mens rea*, in the sense of a blameworthy mind? The earliest decision was that in *Taylor v. Newman*.²³ In that case the accused knew full well that he was shooting at a house pigeon. He had warned its owner to take steps to prevent his pigeons from doing further injury to the defendant's crops. Finding his warning ignored, the next time the defendant found them actually feeding on his crops he fired twice, killing one. It was held, on appeal, that insomuch as the accused had acted in defence of his property, his killing of the pigeon did not fall within the section. All the subsequent cases have based their attitude towards *Taylor v. Newman* on the report in *Best and Smith*. In that report, Blackburn, J., makes no reference to the question of *mens rea*, though Mellor, J. (the other member of the court), says that section 23 was not intended to apply to a case in which there was no guilty mind,²⁴ nor where the act was done

¹⁹ [1948] 1 K.B. 241.

²⁰ [1948] 2 K.B. 311.

²¹ [1936] 1 K.B., at p. 61.

²² In *Jutson v. Barrow* [1936] 1 K.B. 236. Humphreys, J., also appeared in both cases.

²³ (1863) 4 B. & S. 89; 8 L.T. (N.S.) 424; 11 W.R. 752; 32 L.J.M.C. 186.

²⁴ 4 B. & S., at p. 94. In *Farey v. Welch* [1929] 1 K.B., at p. 392, Lord Hewart cites, with approval, this sentence from Mellor, J.'s judgment, but understands it to mean proof of a felonious intent to steal. (See the full wording of section 23 (*supra*.) In *Cotterill v. Penn* [1936] 1 K.B., at

by a person under the honest belief that he was exercising a right. If reference is made, however, to the other reports of the case it will be found that Blackburn, J., was firmly of the opinion that *mens rea* was required, stating that the section only applied to cases where the defendant does the act wantonly and without any colour of right.²⁵

In the light of these views it is difficult to explain or reconcile the decision in *Hudson v. MacRae*,²⁶ decided the same year by the same two judges. That case was concerned with section 24 of the same Act, which deals with unlawful and wilful fishing in water where another person has a private right of fishery. The defendant claimed that, as the public had fished there for over sixty years, he honestly believed that he too was entitled to do so. This defence was rejected on the ground that, where the statute read 'unlawfully and wilfully', a guilty mind was not a necessary ingredient. The court said it would have been different if the word 'maliciously' had been used. It is strange that no such argument had appealed to the same judges in *Taylor v. Newman*. One of the reasons²⁷ given for this *volte face* was

p. 61, the L.C.J.'s opinion undergoes a complete transformation when he says that, where an unlawful and wilful killing or wounding is alleged, no such felonious intent is required because the qualifying words (in section 23)—'under such circumstances as do not amount to larceny at common law'—are not apt words in reference to the words 'kill' or 'wound'. If limited to the word 'take', he says, the meaning of the qualifying phrase becomes obvious. It is, perhaps, worth adding that Avory, J., conceived an entirely different meaning to the qualifying words (see *Farey v. Welch*, at p. 392). Whichever meaning is preferred, this difference in interpretation lends added weight to the view that the reference in *Taylor v. Newman*, to *mens rea* and wantonness, was directed to the term 'wilful'.

²⁵ 8 L.T. (N.S.) 424 and 11 W.R. 752.

²⁶ (1863) 4 B. & S. 585; 33 L.J.M.C. 65 (by far the fuller report). On account of the apparent inconsistent attitude adopted in this case by Blackburn, J. (and Mellor, J.), both Lord Hewart and Avory, J., were of opinion that Blackburn, J.'s judgment in *Taylor v. Newman* had been misreported. (See [1936] 1 K.B., at pp. 61, 62, 63.) It would seem that, in making this criticism, reliance was placed on the one report, in 4 B. & S. 89. In his article in (1936) 52 *Law Quarterly Review*, pp. 60 *et seq.*, Dr. Stallybrass has made it abundantly clear that the criticism was unjustified. Reference to the other reports of the case show a remarkable degree of consistency as to what was said in *Taylor v. Newman*.

²⁷ We are not concerned here with the other point of difference which, Blackburn, J., said distinguished the two cases, namely, that the basis of the decision in *Taylor v. Newman* was the absence of any proprietary interest in pigeons flying abroad which reasoning did not apply to *Hudson v. MacRae*. Assuming that to be the *ratio decidendi* in *Taylor*, it does not explain the subsequent radical change in the two judges' attitude

that section 24 was directed mainly to the protection of property. But so was section 23 and many other sections in the same Act which require the accused's conduct to be wilful. Furthermore, to accept this argument is to say that any offence designed to protect property excludes the necessity for *mens rea* unless the word maliciously is used. That is not in keeping with the authorities.

The facts and decision in the next case, *Horton v. Gwynne*,²⁸ bear a close resemblance to those in *Cotterill v. Penn*, which expressly followed the earlier case. At the time of the shooting the bird was sitting on the ground some forty yards away from the defendant. It may be thought that he had ample opportunity to decide whether or not it was a house pigeon. The justices, at any rate, were satisfied that the accused honestly mistook it for a wild pigeon and dismissed the case. On appeal to the divisional court this finding was reversed, on the ground that 'a person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act'.²⁹ Such language is the direct negation of *mens rea* which, as we have seen in *Taylor v. Newman*, was said to be vital to the offence. It comes as a shock, therefore, to find that same case cited in support of the view that *mens rea* is irrelevant. Referring to *Taylor v. Newman*, Avory, J., said that 'but for the fact that the appellant was there acting in defence of his own property the court would have held that the mere act of killing a house pigeon was an offence if the defendant killed what he shot at'.³⁰ This, of course, is pure surmise and does not tally with the passage in Blackburn, J.'s, judgment in which he said,³¹ 'I do not think that the killing of a pigeon under a mistake—as, for example, where a man thought he was killing his own pigeon—would be a killing

towards *mens rea*. Moreover, the supposed basis of the decision in *Taylor v. Newman* depended on the validity of Croke's note to *Dewell v. Sanders* (1619), in Cro.Jac. 490. In *Hamps v. Darby* [1948] 2 K.B., at p. 320, Evershed, L.J., has shown that this note is unreliable in view of the further report of the same case in 2 Rolle Rep. 3, 30. The following authorities were also cited in support of the proposition that property in tamed pigeons remains so long as they retain an *animus revertendi*—Blackstone, *Commentaries* (8th ed.), Vol. 2, at p. 391; Holdsworth, *H.E.L.*, Vol. 7, p. 489; Williams, *Animals*, p. 252.

²⁸ [1921] 2 K.B. 661.

²⁹ *Per* Darling, J., at p. 662.

³⁰ *Ibid.*, at p. 663.

³¹ 11 W.R. 752.

under this Act'. Yet, if the views of the court in *Horton v. Gwynne* are the law, this man would undoubtedly be liable.

If, as has been argued in this paper, *mens rea* is an essential element in every crime concerned with wilfulness, a mistake of fact must always be a possible defence provided it is made in good faith. To draw a distinction, as Darling, J., suggested,³² between the case of a man who shoots at a crow and accidentally kills a house pigeon, and of another man who shoots at what he believes to be a wild pigeon but kills what turns out to be a house pigeon, is unnecessary. Neither killing can be said to be the result of a 'knowingly wrongful' ³³ act or to have been made with the 'evil intention' of killing a house pigeon. If that is so, neither case is a wilful killing within the meaning of section 23 of the Larceny Act, 1861.

CLAIM OF RIGHT IN WILFUL CRIMES

A few words are all that is required on the application of claim of right in relation to statutory offences based upon wilfulness.

Claim of Right as an Ouster of Jurisdiction

It has already been pointed out that the special proviso of 'fair and reasonable supposition of right' contained in section 52 of the Malicious Damage Act, 1861, applies equally whether the damage is caused wilfully or maliciously. Furthermore, where summary jurisdiction is exercisable in respect of any other statutory offence involving wilfulness, it is suggested that the accused may avail himself of the common law proviso as to bona fide claim of right. The limits of these provisos were discussed fully earlier in this paper and it is not proposed to elaborate on what was said there.

Claim of Right as a Defence

What of the common law defence of claim of right? If the argument is accepted that 'wilfully' imports *mens rea* into an offence, then surely it must be a good defence to show that the

³² [1921] 2 K.B., at p. 662.

³³ Both these phrases were used by R. S. Wright, J., in *Sherras v. de Rutzen* [1895] 1 Q.B.D., at p. 921, when expounding the meaning of *mens rea*. They are to be found too in *R. v. Badger*, and *Smith v. Barnham* (*supra*) where Lord Campbell, C.J., and Bramwell, B., adopted the phrases to explain the term 'wilful'.

accused honestly, though mistakenly, believed himself to be entitled to do the act with which he is charged. If it be shown that he acted in good faith, how can it be said that the defendant acted with evil intention? Such was the line of argument adopted in such cases as *R. v. Badger*, *Smith v. Barnham*, *Taylor v. Newman* and *Younghusband v. Luftig* in which, as we have seen, the defence was allowed. When it is stated, supposedly as a matter of law, that 'the defendant must, of course, have a reasonable ground for his belief',³⁴ are not the judges stressing what is in fact a matter of evidence to be taken into account when deciding whether the accused acted in good faith.³⁵ Proof of *mens rea* is a matter for the prosecution. Because of the difficulty experienced in showing exactly what was the accused's state of mind at the time of the alleged offence, such proof is generally judged by an objective standard. The dictates of expediency justify the adoption of such a standard. But where the accused himself puts forward evidence of his state of mind with a view to rebutting *mens rea*, then surely a subjective test must be applied. If that is so, then even though the grounds for his belief be deemed unreasonable, may not the jury still be convinced that the defendant himself honestly and genuinely thought he was exercising a right to which he was entitled, and thus be satisfied that he had no guilty mind.

Another source of confusion arises where the words of the section, in creating an offence, begin with the phrase, 'Whosoever shall unlawfully and wilfully . . .', and the defence of claim of right is related to the word 'unlawfully' instead of 'wilfully'. Let me explain. Where the accused can show a lawful excuse for his act—as, for example in cases under the Larceny Act, 1861, s. 23, where the killing is done to protect the defendant's crops—it is said that his act ceases to be unlawful.³⁶ At the same time the lawful excuse negatives the mental element signified by the term 'wilfully'. The important point to observe is that where the defendant cannot show a lawful excuse but can,

³⁴ *Younghusband v. Luftig* [1949] 2 K.B., at p. 369.

³⁵ The same attitude towards this question is taken by Professor Glanville Williams in (1949) 65 *Law Quarterly Review*, at p. 492. For a recent statement indicating adherence to the contrary view, viz., that reasonableness of the defendant's belief is an essential condition for excluding liability, see *Reynolds v. G. H. Austin & Sons, Ltd.* [1951] 1 All E.R. 606, *per* Devlin, J., at p. 614.

³⁶ See *Cotterill v. Penn* [1936] 1 K.B., at p. 61.

nevertheless, satisfy the jury that he acted bona fide, believing he had a right to do what he did, his act though unlawful is still not wilful. It is suggested that a more satisfactory attitude would be to relate the defence solely to the epithet 'wilfully'.

In his book on the *Advancement of Learning*, Bacon wrote that words were like a Tartar's bow, they shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment.³⁷ The truth of this adage has been shown in this examination of the part played in statutory crimes of the two simple words 'maliciously' and 'wilfully'. It will continue until the principle is accepted that their presence in any statutory offence points clearly and unequivocally to the need for proving a guilty mind.

³⁷ (5th ed.), Book 2, p. 163.

FRUSTRATION OF CONTRACT

G. J. WEBBER

I PROPOSE, in this paper, first, briefly to restate the true basis of the doctrine of frustration; secondly, to give some account of frustration in decisions since the war with special reference to certain cases in the United States; thirdly, to consider two current problems of frustration, namely, does the doctrine apply to dissolve a marriage, and does a lease come within its ambit.

THE TRUE BASIS OF THE DOCTRINE OF FRUSTRATION

Since the expositions by Lord Wright in the great trilogy—*Constantine*,¹ *Denny Mott*² and *Cricklewood*³—the real basis of frustration is now manifest. Juristically it has nothing to do with implied condition, although this is the most frequent explanation given by the judges.⁴ When the doctrine was first promulgated in *Taylor v. Caldwell*,⁵ Blackburn, J., based it upon implied condition, but, as Professor Corbin recently pointed out,⁶ that great judge ‘gave in a nutshell several of the explanatory rationalisations of the “frustration” doctrine that appear in the decisions and articles of the present century, including “an implied condition”, the foundation of the agreement, and the opinion of “men in general” (including the judges) that there should be such a condition’. The implied condition, as Lord Sumner said in the *Hirji Mulji Case*,⁷ is ‘really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands’.

¹ *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C. 154, at p. 185.

² *Denny Mott & Dickson Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265, at p. 276.

³ *Cricklewood Property & Investment Trust v. Leighton's Investment Trust Ltd.* [1945] A.C. 221, at pp. 237–241.

⁴ See *Effect of War on Contracts* (2nd ed., 1946), pp. 408–414.

⁵ (1863) 3 B. & S. 826.

⁶ ‘Frustration of Contract in United States’ (1947), 29 *Journal of Comparative Legislation*, p. 2.

⁷ *Hirji Mulji v. Cheong Yue S.S.Co.* [1926] A.C. 497, at p. 510.

This legal fiction, which has survived from the days when pleadings were strict, should now be shed, for it diverts the search for the true criterion.⁸ 'The court decides', said Lord Wright in the *Constantine Case*,⁹ 'not what the parties actually intended, but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man'. Hence frustration is a question of law for the judge upon the facts as found.¹⁰

Williston had already propounded the same principle when he wrote¹¹: 'Any qualification of the promise is based on the unfairness or unreasonableness of giving it the absolute force which its words clearly state. In other words, because the court thinks it fair to qualify the promise, it does so, and quite rightly; but clearness of thought would be increased if it were plainly recognised that the qualification or defence is not based on any expression of intention by the parties'. 'The court thinks it fair to qualify the promise'; not, be it observed, to grant absolution.¹² Mark that word *qualify*, for in an outstanding judgment containing the most recent restatement of frustration, *qualify* is the term used. I refer to the judgment of Denning, L.J., who, in the *British Movietonews Case*,¹³ declared: 'In these frustration cases, as Lord Wright said, the court really exercises a qualifying power—a power to qualify the absolute literal or wide terms of the contract—in order to do what is just and reasonable in the new situation'.

In the *Denny Mott Case*¹⁴ Lord Wright goes further than Williston. Frustration, he said, is not an exception to the duty to perform a contract or pay damages. 'It is a substantive and particular rule which the common law has evolved'. Upon

⁸ See *The Pollock-Holmes Letters* (1942), Vol. 2, pp. 38, 39.

⁹ *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C. 154, at p. 185.

¹⁰ *Denny Mott & Dickson Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265, at p. 276.

¹¹ In the first edition (1920) of his monumental *Law of Contracts*, and again in the second edition (1936) at s. 1937.

¹² See *per* Earl Loreburn, L.C., in *F. A. Tamplin Steamship Co., Ltd. v. Anglo-American Petroleum Products Ltd.* [1916] 2 A.C. 397, at p. 403, and contrast *Cheshire and Fifoot, Law of Contracts* (2nd ed., 1949), p. 417.

¹³ *British Movietonews Ltd. v. London & District Cinemas Ltd.* [1951] 1 K.B. 190, at p. 200.

¹⁴ *Denny Mott & Dickson Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265, at pp. 274, 275.

frustration a contract is automatically dissolved. This results not from the choice of a party, but from what has happened and its effect upon the possibility of performing the contract. 'The court', he continues, 'has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment'.

Thus, juristically, it is a new doctrine—capable of indefinite development. So far as the theory of implied condition is concerned, Lord Wright went on to say: 'The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for, what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: "Well, if that happens all is over between us". On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess . . . To my mind, the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation'.¹⁵

Although, in the *Constantine Case*,¹⁶ Viscount Simon, L.C., had regarded the implied term as the most satisfactory basis of the doctrine, yet in the classical definition of frustration promulgated in the *Cricklewood Case*¹⁷ three years later, the implied term has gone. Frustration, it was said in the latter case, is 'the premature determination of an agreement . . . owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement'.

RECENT ENGLISH DECISIONS ON FRUSTRATION

Compared with the position after the first war, recent cases on

¹⁵ *Denny Mott* [1944] A.C., at p. 275. See *per* Atkin, L.J., in *Russkoe etc. v. John Stirk & Sons Ltd.* (1922) 10 Ll.L.Rep. 164, at pp. 216, 217; and *per* Viscount Simon, L.C., in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, at p. 45.

¹⁶ [1942] A.C. 154, at p. 163.

¹⁷ [1945] A.C. 221, at p. 230.

frustration have been surprisingly few, for, on the whole, both commercial men and government departments compose their differences amicably; only the exceptional case comes to court. The judgment of Denning, L.J., in the *British Movietonews Case*¹⁸ delivered on behalf of the Court of Appeal (Bucknill and Denning, L.J.J., and Roxburgh, J.) stands next to the great trilogy. Its importance is enhanced in that the heretical reasoning of Lord Wright in *Constantine*¹⁹ and *Denny Mott*²⁰ is explicitly accepted. The decision appears to go much further than previous decisions on frustration, for it applies the doctrine to an absolute contract where, even though an un contemplated turn of events had supervened, the written terms appeared to have included the contingency.

The problem in *British Movietonews* is fairly posed in the first paragraph of the judgment. 'The question in this case is whether an agreement, which was made during the war for the exhibition of news-reels, is still in force. That agreement was expressed to remain in full force and effect "during the continuance of the Cinematograph (Control) Order, 1943", and that control order does still continue. So the film distributors insist that the agreement still remains in force. But the exhibitors say that the circumstances have changed so much that it has come to an end'.²¹

The 1943 Order was made—under a Defence Regulation which, in turn, was made under the Emergency Powers (Defence) Act, 1939—for the purpose of 'maintaining supplies and services essential to the life of the community'. On February 24, 1946, the Act of 1939 expired and was replaced by the Supplies and Services (Transitional Powers) Act, 1945. The Order was continued in force, not for the same purposes, but to secure a sufficiency of supplies 'essential to the well-being of the community or their equitable distribution'. In July, 1946, the Board of Trade took off all restrictions on cinematograph films, except the acquisition of news-reel prints for distributors. Finally, the Supplies and Services (Extended Purposes) Act, 1947, enabled orders to be continued 'for reducing imports . . . and for redressing the balance of trade', *i.e.*, to save dollars.

¹⁸ *British Movietonews Ltd. v. London & District Cinemas Ltd.* [1951] 1 K.B. 190. The decision is under appeal to the House of Lords.

¹⁹ [1942] A.C. 154, at pp. 184–187.

²⁰ [1944] A.C. 265, at p. 265.

²¹ [1951] 1 K.B., at p. 197.

Upon the exhibitors' contention that the contract had been frustrated with the expiry of the Emergency Powers Act, 1939, Denning, L.J., observed: 'When we say that a contract does not apply in a new situation because it is frustrated, we recognise that the words are wide enough to cover the situation, but we hold that they do not apply because the parties did not contemplate such a surprising turn of events'²² . . . '.

Among the cases cited in *British Movietonews* was the important decision in *Parkinson*,²³ where no frustrating event had occurred, but only an un contemplated turn of events. In spite of the absolute terms of a building contract, that the sum to be paid to the contractor should not exceed actual cost plus net profit remuneration of £300,000—the parties having contemplated a total cost of £5,000,000—yet, extras bringing the cost up to £6,683,056, the Court of Appeal held that the contractors were entitled to reasonable extra remuneration for work done which was 'impliedly excluded from the contemplation of the parties and the scope of the contract'.

In that case, Asquith, L.J., referring to an earlier decision,²⁴ said: 'Indeed . . . the contract appeared, on a literal construction, to make express positive provision for the legal consequences of the very event which in fact changed the contract from a summer to a winter one. . . . It was held, however, that these clauses, though literally applicable, did not apply to a delay in providing the site so extreme as to throw the work from the summer into the winter months and so to revolutionise its character'.²⁵

From the earlier judgments Denning, L.J., deduced this principle: ' . . . No matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not

²² *Ibid.*, at p. 200.

²³ *Parkinson v. Commissioner of Works* [1949] 2 K.B. 632.

²⁴ *Bush v. Whitehaven Trustees* (1888) 52 J.P. 392, based, in turn, upon another leading case in the law of frustration, viz., *Jackson v. Union Marine Insurance Co., Ltd.* (1874) L.R. 10 C.P. 125; see *per* Bramwell, B., at p. 148.

²⁵ [1949] 2 K.B., at p. 667.

apply them to the unanticipated turn of events, but will do therein what is just and reasonable'.²⁶

Now, in *British Movietone News* the agreement was expressly stated to apply during the continuance of the *Cinematograph Film (Control) Order, 1943*. That order is still in existence. Although the parties did not contemplate that the order would last so long, and that it would be continued five years into peace to deal with dollar shortages, the parties had expressly provided that it was to continue while the order was in existence. Had they assumed the risk?²⁷ Had a contrary intention been made plain which prevented frustration from applying? The cases on frustration basing the *dictum* upon the implied term, are unanimous that no frustrating term may be implied which conflicts with an express term.²⁸

This is a real difficulty, but there are two answers. First, frustration does not depend upon an implied term. The proviso 'unless a contrary intention appears' may simply mean that frustration will not apply if the parties have assumed the risk and have explicitly²⁹ made full provision for the unanticipated turn of events. They had not done so here.

Secondly, despite the explicit words of the agreement that it applied during the continuance of the 1943 Order, yet if it were necessary to formulate the implied term, 'it was to be implied that the supplemental agreement continued for the duration of the emergency contemplated by the Emergency Powers (Defence) Act, 1939, under which and for the purposes of which alone the order was made in 1943, and, therefore, came to an end when that Act came to an end on February 24, 1946, and with it the purposes for which the order was made'.³⁰

The court accordingly held that the supplemental agreement ceased to apply before May, 1948, and that the exhibitor could

²⁶ [1951] 1 K.B., at p. 201.

²⁷ See *Williston*, s. 1935; *Restatement of the Law of Contracts* (1932) Vol. 1, ss. 288, 457.

²⁸ See *per* Viscount Simon in the *Constantine Case* [1942] A.C. 154, at p. 163; *The Tamplin Case* [1916] 2 A.C. 397, *per* Lord Parker of Waddington, at p. 422; *Anglo-Northern Trading Co., Ltd. v. Emlyn Jones & Williams* [1917] 2 K.B. 78, *per* Bailhache, J., at p. 86; *Metropolitan Water Board v. Dick Kerr & Co.* [1918] A.C. 119, *per* Lord Parmoor, at p. 137; *Re Badische Co., Ltd.* [1921] 2 Ch. 331, *per* Russell, J., at p. 379; *Tatem v. Gamboa* [1939] 1 K.B. 132, *per* Goddard, J., at p. 138.

²⁹ *Tatem v. Gamboa* [1939] 1 K.B. 132, *per* Goddard, J., at p. 138.

³⁰ [1951] 1 K.B., at pp. 202-203.

terminate the principal agreement. The decision—though at first sight it appears difficult to reconcile with principle—follows upon the reasoning in *Bush v. Whitehaven Trustees*²⁴ and in *Parkinson*.²³

Denning, L.J., explained the governing principle clearly when he said: 'This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words, in which they happen to be phrased, to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the scope of the contract. Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse unforeseen injustice by saying to the sufferer: "It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself". We no longer credit a party with the foresight of a prophet, or his lawyer with the draftsmanship of a Chalmers'.³¹

I must now briefly refer to a few other recent decisions. Mere difficulty, *e.g.*, of obtaining licences, or even the impossibility of performing certain obligations under a lease, *e.g.*, the duty to repair, do not relieve a tenant from the duty to pay damages for breaches of covenant: so Denning, J. (as he then was) held in *Eyre v. Johnson*.³²

On the other hand, where a contract contains a cancellation clause if export should be prohibited, and the seller's government creates a monopoly in the goods, the contract is frustrated by the decrees of the seller's government: *Société Co-opérative Suisse des Céréales etc. v. La Plate Cereal Co. S.A.*³³ The new conditions, Morris, J., held, had fundamentally altered the situation. The export of maize was by law 'removed from the scope of private obligation', and the *de facto* prohibition of export overthrew the basis of the contract.

³¹ *Ibid.*, at p. 202. See editorial note, 'Frustration of Purpose' (1951) 67 *Law Quarterly Review*, pp. 1-3, suggesting that the 1943 Order came to an end, for the purpose of the supplemental agreement, when the 1939 Act expired, and that the Order now in force, made under the 1945 Act, is in fact a new Order although it is described as being a continuation of the old one.

³² [1946] K.B. 481, applying *Matthey v. Curling* [1922] 2 A.C. 180, *per* Lord Buckmaster, at p. 228. See, also, *Blackburn Bobbin Co. v. Allen (T. W.) & Sons* [1918] 1 K.B. 540, *per* McCardie, J., at p. 545; *Williston*, s. 1963; *Restatement*, s. 467.

³³ (1947) 80 Ll.L.Rep. 530, at p. 543.

What was the effect of the National Service Acts during the war, upon a contract involving continuous duties, when one of the parties was called up? This was extensively examined by Streatfield, J., in *Morgan v. Manser*.³⁴ Briefly, what happened in that case was that, in 1938, a music hall artiste appointed the plaintiff his manager for ten years, during which time the defendant agreed not to offer his services to any other agent. He was called up in 1940 and demobilised in 1946. The plaintiff claimed damages upon the ground that since demobilisation the defendant had offered his services to other agents. After call-up the parties had continued to treat the contract as subsisting.

Pointing out that the contract was essentially personal, the learned judge said: 'It involved the parties in a continuous relation involving efforts on both sides, and neither of them was able to carry out these efforts in the manner which was contemplated by them. In my view, to affirm their contractual adventure now, although it could not have been acted on, is to substitute a new contract.'³⁵

Morgan v. Manser has been criticised in an editorial note in the *Law Quarterly Review*³⁶ as going beyond the rule of 'commercial impracticability'³⁷ and the destruction of the 'identity of the work or service'³⁸; from 1946 to 1948 services could still be rendered. But this was a *ten years' contract* involving both the continuity and the development of a commercial relation which, in 1940, had become 'commercially impracticable'; its 'identity' was completely changed.

Where part of an intended cargo is destroyed by fire and the contract does not refer to the shipping of a specific cargo, frustration does not operate.³⁹

In the *Monarch Steamship Case*⁴⁰ frustration was unsuccessful

³⁴ [1948] 1 K.B. 184, at pp. 187-192. See, too, *Schlengemann v. Meyer* [1920] C.P.D. 494, 504 (Cape Province) where the court held that the contract was made between a company and a managing director who was interned, and *Hersman v. Shapiro* [1926] T.P.D. 367 (Transvaal). These cases are cited in R. W. Lee, 'Frustration of Contract in the Union of South Africa' (1945) 27 *Journal of Comparative Legislation*, p. 8.

³⁵ [1948] 1 K.B., at p. 192. Streatfield, J., cited in support *Marshall v. Glanvill* [1917] 2 K.B. 87.

³⁶ (1948) 64 *Law Quarterly Review*, pp. 179, 180.

³⁷ *Horlock v. Beal* [1916] 1 A.C. 486, per Earl Loreburn, at p. 492.

³⁸ *Metropolitan Water Board v. Dick Kerr & Co., Ltd.* [1918] A.C. 119, per Lord Dunedin, at p. 128.

³⁹ *A/S E. B. Aaby's Reveri v. Lep Transport* [1948] *Current Law Year Book*, § 3446; (1948) 98 *Law Journal Newsp.* 409.

⁴⁰ *Monarch SS. Co. v. Karlshamns Oljefrabiker (A/B)* [1949] A.C. 196.

fully urged. In April, 1939, a British vessel was chartered to discharge at Sweden. Owing to delay, caused by the unseaworthiness of the vessel, it did not reach Sweden before the outbreak of the war and was ordered by the Admiralty to discharge at Glasgow. The Swedish indorsees of the bill of lading were held entitled to recover from the owners the costs of transshipment to Sweden. 'Reliance cannot be placed on a self-induced frustration'.⁴¹

Lord Wright's speech, one of his last, concludes with some observations upon the difficulty and danger of relying in an English court upon a particular United States' decision, 'torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts'.⁴² With this caveat in mind, I now turn to some recent decisions upon frustration in United States courts.

RECENT UNITED STATES DECISIONS ON FRUSTRATION

Of particular interest is the case of *Lloyd v. Murphy*, decided by the Supreme Court of California in 1944, which was concerned with the frustration of a lease.⁴³ A five years' lease of premises, for the sole purpose of the sale and repair of new automobiles (and for no other purpose except with the lessor's written consent), was executed in 1941 after the passage of the National Defence Act, which provided for the mobilisation of industry. The parties knew that production would soon be restricted.

In January, 1942, the Federal Government prohibited the sale of new automobiles, but in March the lessor waived the restrictions on user. The tenant, however, vacated the premises and the lessors claimed a declaration to determine their rights under the lease, and judgment for unpaid rent. The trial judge found for the plaintiffs. The tenant appealed, contending that the purpose of the lease was frustrated and that his duties under the lease were terminated. The judgment was affirmed. The tenant failed to prove that the possibility of war and its consequences on the production and sale of new automobiles, was

⁴¹ *Bank Line Ltd. v. Arthur Capel & Co.* [1919] A.C. 435, *per* Lord Sumner, at p. 452.

⁴² [1949] A.C., at p. 231.

⁴³ (1945) 153 Pac. (2nd), at p. 47. See, too (1945) 43 *Michigan Law Review*, p. 985.

wholly outside the contemplation of the parties so as to justify him, on the theory of commercial frustration, in terminating the lease.

The English courts, said Traynor, J., have refused to apply the doctrine of frustration to leases, on the ground that an estate is conveyed to the lessee. Many courts in the United States have accordingly held that the tenant, as owner of the estate, bears the risks, 'but the modern cases', the learned judge continued, 'have recognised that the defence may be available in a proper case, even in a lease'.⁴⁴ Traynor, J., cites Williston in support, who indicates 'the gravitation of the law towards a recognition of the principle that fortuitous destruction of the value of performance wholly outside the contemplation of the parties may excuse a promisor even in a lease'.⁴⁵

The learned judge then proceeds to point out that although frustration is akin to impossibility, frustration is not a form of impossibility, for it includes cases of 'extreme impracticability of performance'. 'Performance remains possible', he says, 'but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual, but not literal, failure of consideration'.

This contrast between impossibility and frustration will also be found in the Law Reform (Frustrated Contracts) Act, 1943—a statute dealing with the *effects* of frustration—which begins with the words, 'Where a contract governed by English law has become impossible of performance or been otherwise frustrated . . .'. The range of circumstances to which frustration may apply is wide and various,⁴⁶ and of those circumstances impossibility, in modern law, is one category.

Traynor, J., next examines the underlying ratio of the doctrine. What is the inarticulate premise in the mind of the judge, that in one case leads him to declare a contract frustrated, yet in another, prevents him from this conclusion?

'The question', he says, 'in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete

⁴⁴ 153 Pac. (2nd), at p. 49.

⁴⁵ *Law of Contracts*, Vol. 6 (rev. ed. 1938), s. 1955, pp. 5485-5487. Traynor, J., cites *inter alia*, *Krell v. Henry* [1903] 2 K.B. 740.

⁴⁶ *The Constantine Case* [1942] A.C. 154, *per* Lord Wright, at p. 183, and *per* Lord Porter, at p. 198.

destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case . . . and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected'.⁴⁷

In the present case, the risk of war was assumed: the defendant had failed to prove that the possibility of war and its consequences was an unanticipated consequence wholly outside the contemplation of the parties.⁴⁸ Nor had the value of the lease been destroyed. The sale of automobiles had not become impossible or illegal; it was merely restricted and rendered less profitable and more difficult. Moreover, the lessors had waived the restrictions upon user and the power to sublet; indeed, after the tenants had vacated, the premises were relet.⁴⁹ Governmental restrictions had not destroyed the value of the lease.

Two Californian cases were cited and distinguished, in the first of which demised premises were to be used only as a general winery. Upon the prohibition of alcoholic beverages the contract became illegal to perform and the court consequently excused the tenant from further performance. The lease inoperative, the lessees must surrender the premises.⁵⁰ Of that case, Traynor, J., observed that the court might have applied the doctrine of frustration, insomuch as the purpose of the lease was totally destroyed, and with that purpose, its value.

⁴⁷ *Ibid.*, citing *Williston*, Vol. 6, s. 1963; *Restatement*, s. 454; Edwin W. Patterson, 'Constructive Conditions in Contracts', 42 *Columbia Law Review*, pp. 903-949. See, also, 'Effect of War on Contracts', pp. 438-443, in particular, the exposition of W. H. Page upon invoking the fiction of the implied condition to explain not the process but the result (*ibid.*, at p. 439). Traynor, J., seems to accept Patterson's 'Disturbed Balance Theory' (*ibid.*, at p. 442). See also A. L. Corbin (1945) 56 *Yale Law Journal*, pp. 851, 852; 'Frustration of Contract in the United States', (1947) 29 *Journal of Comparative Legislation*, pp. 1, 8.

⁴⁸ 153 Pac. (2nd), at p. 51. See (1945) 40 *Illinois Law Review*, pp. 290-294, and cases there cited, in particular, *Kinzer Construction Co. v. State* (1910) 125 *N.Y.S.* 46, *per* Rodenbeck, J., at p. 55; *Kramer v. Uchillelle* (1942) 288 *N.Y.* 467; *Cannock Realty Corporation v. Vine Electric Co.* (1942) 37 *N.Y.S.* (2nd) 139: if government regulations prevent user for the primary purpose of the lease, the lease is terminated; *Colonial Corporation v. Hannan Sales & Services Inc.* (1942) 34 *N.Y.S.* (2nd) 116, 122, where the facts were similar to those in *Lloyd v. Murphy*. See also note in *Effect of War on Contracts*, p. 585.

⁴⁹ 153 Pac. (2nd), at p. 52.

⁵⁰ *Industrial Development & Land Co. v. Goldschmidt et al.* (1922) 206 Pac. 134, 136.

In the other Californian case, where the user of the premises was not restricted to liquor, the Prohibition Amendment did not terminate the lease and, therefore, the doctrine of frustration was inapplicable.⁵¹

The next United States decision was concerned with an Army order issued during the recent war, excluding persons of Japanese ancestry from a portion of Los Angeles. A Japanese tenant of premises situated in the prohibited area and used as an hotel and offices, claimed that his obligations under the lease were terminated by the evacuation order. The trial judge found that the order did not make it impossible for him to perform his obligations as lessee. On appeal, the judgment was reversed by a majority, and the case was remitted for the trial court to permit such amendment to pleadings and proof, as would enable the court to ascertain whether the desired object of the parties had been frustrated.⁵²

The court cited *The Restatement* which declares: 'Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is, or surely would be, frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears'.⁵³ Applying this principle to the facts of the case before them, the appellate court pointed out that the basis of the contract and of the defendant's business was the continuous presence of the Japanese colony in southern California. This had disappeared and the tenant should be discharged.

The court referred to a case in which war-time regulations had prohibited the sale of new automobiles except to such persons who obtained ration board certificates. The lessee, an automobile dealer, was held bound by his lease, even though the lease contemplated the sale of new cars. Here, the sale was not prohibited, but merely restricted,⁵⁴ and as was stated: 'The rule is that where the lease is exclusive the subsequent passage of prohibitory laws terminates it. A change in the law during the term of the

⁵¹ *Grace et al. v. Croninger et al.* (1936) 55 Pac. (2nd) 940, 941.

⁵² *Brown v. Oshiro* (1943) 136 Pac (2nd) 29, 31.

⁵³ Section 288.

⁵⁴ *Byrnes v. Balcom*, 265 App.Div. 268; (1942) 38 N.Y.S. (2nd) 9, 801, at p. 803.

lease, however, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release the tenant from his obligation to pay rent'.⁵⁵

In *Pearce, Young, Angel Co. Inc. v. Charles R. Allen Inc.*⁵⁶ you will find the same point as in *Howell v. Coupland*⁵⁷ where the contract was for potatoes grown on a particular land and the crop had failed. The contract in the Californian case was for blackeye peas, found by the Supreme Court (reversing the trial court on the facts), to refer to peas from the locality of Dilley in Texas. This locality was in the contemplation of both parties. The entire crop being destroyed by torrential rains which constituted an act of God, the seller was not liable for failure to deliver.

That a temporary impossibility may be serious enough to discharge a contract is illustrated by the case of *Village of Minneota v. Fairbanks, Morse & Co.*⁵⁸ This decision recalls *The Metropolitan Water Board Case*,⁵⁹ where Lord Dunedin had propounded a good working rule to the effect that 'an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted'. A contract was made in 1940 for the construction of an electrical power plant for the village of Minneota. The contract contained a clause that if, by reason of certain litigation, the work did not begin until September, 1944, the contract would be void. In fact the litigation finished in 1942, but on account of the war building could not start until 1945, when building costs were much higher. The company was excused from performance.

The decision was supported by a principle laid down in *The Restatement*, where it is said: 'Temporary impossibility

⁵⁵ Cited in *Davidson v. Goldstein* (1943) 136 Pac. (2nd), p. 667. In *Updike Grain Corporation v. Megan Trustee* (1938) 305 U.S. 663, it was held that 'a lease agreement for the rental of a grain elevator is not frustrated where the rates of railroad feeding the elevator are changed so that storage in it is no longer feasible and its operation no longer profitable'.

⁵⁶ (1948) 50 S.E. (2nd) 698, citing *Williston*, Vol. 6, s. 1946. For a criticism of the decision, see (1949) 47 *Michigan Law Review*, pp. 711-713.

⁵⁷ (1874) L.R. 9 Q.B., pp. 462-466; (1876) 1 Q.B.D. 258, at p. 263.

⁵⁸ (1948) 31 N.W. (2nd) 920, 927. See, too (1948) 47 *Michigan Law Review*, pp. 117-119.

⁵⁹ *Metropolitan Water Board v. Dick Kerr & Co., Ltd.* [1918] A.C. 119, at p. 128. See, also, *per Warrington*, L.J., [1917] 2 K.B. 1, at p. 24.

of such character that, if permanent, it would discharge a contractor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility'.⁶⁰ The court also cited the following passage from Williston: 'The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor'.⁶¹

Lord Wright's comment upon the rule of Lord Dunedin should be remembered. Frustration does not occur simply because 'when the interruption ceases conditions of performance may be different'. '. . . the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period'.⁶²

DOES THE DOCTRINE OF FRUSTRATION APPLY TO DISSOLVE A MARRIAGE?

I now turn to consider two current problems on frustration, the first of which is this: Does the doctrine apply to dissolve a marriage? The question was discussed in the recent case of the *Four Russian Marriages*,⁶³ and in the undefended petition for nullity, *Kenward v. Kenward*,⁶⁴ but the actual decisions proceeded on other grounds.

In *Way v. Way*, Hodson, J., held that the ceremonies of

⁶⁰ Section 462.

⁶¹ Vol. 6, ss. 1931, 1957.

⁶² *Denny Mott Case* [1944] A.C. 265, at p. 278.

⁶³ *Way v. Way*; *Rowley v. Rowley*; *Kenward v. Kenward*; *Whitehead v. Whitehead* [1950] P. 71.

⁶⁴ [1951] P. 124, reversing the decision of Hodson, J., in *Way v. Way* [1950] P. 71.

marriage performed in Russia between the domiciled Englishmen and the Russian women were valid. There was no 'mistake' in law. The marriages were valid even though (a) certain formalities required by Soviet law were not complied with, and (b) the women were not allowed to leave Russia and the men were not allowed to enter, and the parties were thus permanently deprived of the right to live together.

In the case of *Way*, the respondent wilfully refusing to consummate, the petitioning husband obtained his decree. Rowley's petition was adjourned; there was an alternative prayer for divorce on the ground of adultery. Kenward's petition, Hodson, J., dismissed. He adjourned the petition of Whitehead with liberty to restore. Kenward appealed.

The Court of Appeal held that the marriage was no marriage and that the petitioner was entitled to a decree of nullity. There was an absence of certain formalities—*e.g.*, the failure of the Russian registrar to call for declarations before the ceremony, to read to the parties the relevant sections of the Soviet code and, in particular, the omission to enter on the man's passport the statement that he was married. The marriage had been celebrated in October, 1945. Eighteen months later—'not long after this so-called marriage had occurred'⁶⁵—the law 'was amended so as to prohibit marriage between Russian citizens and foreigners. On these grounds Sir Raymond Evershed, M.R., and Bucknill, L.J., said that the Russian officials did not intend the parties to contract a valid marriage.

In the reasoning of the majority Denning, L.J., obviously felt very much difficulty. He admitted that in an English marriage, when both parties are domiciled here, there exists no authority for introducing any new condition by way of frustration.⁶⁶ He held, however, that 'it was a condition of the marriage that the parties should be allowed to live together. The parties intended to come to England to live, and in England the right to matrimonial consortium is an essential condition of every marriage. . . . For failure of that condition the marriage is voidable in these courts'.⁶⁷

⁶⁵ [1951] P., *per* Evershed, M.R., at p. 130.

⁶⁶ *Ibid.*, at p. 144.

⁶⁷ *Ibid.*, at p. 146. See note in (1950) 66 *Law Quarterly Review*, p. 434: 'Although this conclusion is an obviously desirable one, the courts may, in future cases, find some difficulty in holding that a marriage which creates a status can be entered into subject to a condition, even though both parties expressly or impliedly agree to that condition'.

Now frustration does not depend upon the choice or election of a party: it is completely outside the category of the voidable. When frustration applies, a contract is not voidable but, at that moment, whether the parties knew it or not, and whether or not they agree, the contract is dissolved. As Viscount Simon, L.C., pointed out in *The Constantine Case*, frustration kills the contract itself and discharges both parties automatically.⁶⁸ With respect, I suggest that the reasoning of Denning, L.J., does not come within the ambit of frustration.

Furthermore, as Hodson, J., stated in the court below, frustration has never been applied to the status of marriage, as opposed to a contract to marry. He cited Brett, J., who, in *Niboyet v. Niboyet*,⁶⁹ had declared: 'Marriage is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each'. To such a status, said Hodson, J., the doctrine of frustration has no application.⁷⁰

To the suggestion that a marriage is frustrated if, owing to the occurrence of an irresistible and extraneous event, neither party can thenceforward enjoy any of the rights or fulfil any of the obligations of the married state, the Master of the Rolls replied: 'How is the court to decide whether the event which has happened is not only extraneous but irresistible? If the doctrine is to be applied to marriages between domiciled Englishmen and foreigners, there is no reason why it should stop there and should not apply to marriages between two domiciled English persons. In the latter event, then it would appear to introduce a ground for dissolution of marriage which is not found in any statute'.⁷¹

The court, in my submission, would have no difficulty in deciding whether an event was 'irresistible'. The real difficulty is whether the court would be entitled, in effect, to introduce a new ground for dissolution of marriage. Frustration is, comparatively, a new doctrine, and has not yet been applied to a lease. The grounds of divorce have been carefully determined by statute, although, within their frontiers, the judges have made these grounds flexible. The dissolution of marriage does

⁶⁸ [1942] A.C. 154, at p. 163.

⁶⁹ (1878) 4 P.D. 1, at p. 11.

⁷⁰ [1950] P. at p. 76.

⁷¹ [1951] P. at p. 138.

not seem to me to be analogous, in English law, to the dissolution of a contract.⁷²

DOES THE DOCTRINE OF FRUSTRATION APPLY
TO A LEASE?

The second current problem is concerned with the application of frustration to a lease. The point remains open in the House of Lords. On the other hand, in the Court of Appeal, MacKinnon, L.J., delivering the short judgment of that court in the *Cricklewood Case*,⁷³ said that the doctrine has never been applied to a demise of real property. 'Indeed', he continued, 'there is clear authority that it cannot be so applied . . . we do not think it necessary to examine the question further'. The authorities, however, upon which the Court of Appeal relied, are by no means clear: the dicta, upon close examination, would seem to be *obiter*.

Where an alien enemy is prohibited from residing within the area of the demised premises, it has, nevertheless, been held in *Schlesinger's Case*⁷⁴ that he remains liable for rent and can sub-let, since personal residence is not the basis of his tenancy. Lush, J., at the end of his judgment in that case, said there was a further answer to the appellant's contention, namely, that the agreement vested in him a term of years and that chattel interest remained unaffected.⁷⁵ This *dictum* is the basis of all the *dicta* in the later cases.

It was adopted by the Earl of Reading, C.J., in *Whitehall Court Ltd. v. Ettlinger*,⁷⁶ where it was held that the requisition of a flat which prevented the tenant from personally residing there, did not affect his chattel interest. Another case in which the question of frustration in relation to a lease was discussed was that of *Matthey v. Curling*.⁷⁷ In fact, the actual decision in that case did not turn upon frustration at all, but related to the effect of requisition upon a covenant to re-estate. A house was requisitioned, and before the term of the lease expired the

⁷² See two notes (1950) 66 *Law Quarterly Review*, pp. 155, 157, and pp. 433, 434.

⁷³ *Leighton's Investment Trust Ltd. v. Cricklewood Property & Investment Trust Ltd.* [1943] 1 K.B. 493.

⁷⁴ *London & North Eastern Estates v. Schlesinger* [1916] 1 K.B. 20.

⁷⁵ *Ibid.*, at p. 24.

⁷⁶ [1920] 1 K.B. 680, at p. 686.

⁷⁷ [1922] 2 A.C. 180.

house was destroyed by fire. It was held that the lessee remained liable both to pay rent and to reinstate the premises.

Frustration, according to Bankes, L.J., did not apply: the assignee's executors had continued in occupation of a great part of the premises and had paid rent for the whole.⁷⁸ Nor did he think that any reasonable lessor would have agreed to the dissolution of the lease had he been asked at the time of the granting of the lease. Frustration, Younger, L.J., observed, had never yet been extended to a lease. Nor was the doctrine to be extended.⁷⁹

The third member of the court, Atkin, L.J., while agreeing, on the facts, that the contract was not determined, thought that there was an eviction paramount from part of the premises. Moreover, he added—and this observation *obiter* was to be the basis of the appeal in the *Cricklewood Case*⁸⁰—‘it does not appear to me to be conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration’.⁸¹

The House of Lords affirmed the majority judgment of the Court of Appeal. There was no eviction by title paramount said Lord Buckmaster, or by the lessor, but a mere eviction which did not relieve the tenant of liability under the lease: ‘no law has prohibited performance, though enjoyment of the premises has been interfered with by legal powers’. Moreover, ‘a terminable occupation by military authorities during an uncertain time, for which compensation may prove to be recoverable, constitutes no answer to the obligations of this repairing covenant’.⁸² It may also be pointed out that Lord Atkinson approved of the decision in the *Whitehall Case*.⁸³

⁷⁸ [1922] 2 A.C. 180, at pp. 185, 186.

⁷⁹ *Ibid.*, at p. 210.

⁸⁰ *Ibid.*, at p. 210.

⁸¹ *Ibid.*, at p. 200.

⁸² *Ibid.*, at p. 230.

⁸³ *Ibid.*, at p. 237.

In *Swift v. Macbean*,⁸⁴ decided during the recent war, Birkett, J., followed these three authorities. By a pre-war agreement a furnished house was let from the outbreak of war until cessation of hostilities. After the tenant had entered, the house was requisitioned. Frustration, it was held, did not apply. In this respect there was no difference between a furnished and an unfurnished house. If, however, frustration did apply, the contract was at an end.

Again, in the *Pelepah Case*,⁸⁵ Tucker, J. (as he then was) held that the Japanese occupation of Johore in 1942 did not frustrate a tin-mining sub-lease granted in 1932 for twenty-one years, with a right to call for a further twenty-one years. Frustration did not apply to a mining lease any more than to any other lease.

Can frustration, then, ever be applied to a lease? The *Cricklewood Case*,⁸⁶ now the *locus classicus*, leaves the answer in doubt, and to that case we now turn our attention. We need not concern ourselves with the facts, since the House of Lords was agreed that no frustration had, in fact, supervened. On the general question of frustration both the trial judge, Asquith, J. (as he then was) and the Court of Appeal (Scott, MacKinnon and du Parc, L.J.J.) were of the opinion that the doctrine could not be applied to a demise of real property.

The House of Lords, on the other hand, was evenly divided. Lord Russell of Killowen and Lord Goddard knew of no such power in the court to declare the lease to be at an end. Viscount Simon, L.C., and Lord Wright saw no reason in principle why a lease should not be terminated by frustration, though the cases where that could occur would be rare and exceptional. Lord Porter reserved the point.

According to Lord Russell of Killowen 'a lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less'. The obligations under a lease are incidental to the relationship of landlord and tenant. However

⁸⁴ [1942] 1 K.B. 375, at p. 389.

⁸⁵ *Pelepah Valley (Johore) Rubber Estates v. Sungei Besi Mines Ltd.* (1944) 170 L.T. 338, at pp. 339, 340.

⁸⁶ [1945] A.C. 221, affirming *Leighton's Investment Trust Ltd. v. Cricklewood Property and Investment Trust Ltd.* [1943] 1 K.B. 493, 495. Followed in *Denman v. Brise* [1949] 1 K.B. 22 (C.A.). See *Effect of War on Contracts*, pp. 570-585, 736-742.

difficult they be or impossible, the lease remains. Only upon express provision does a lease determine. Nor can the court order a tenant to surrender his term.⁸⁷

Lord Goddard agreed, saying that such is the general opinion in the profession. 'So long as the interest remains in the tenant, there is no frustration though particular use may be prevented'.⁸⁸ If frustration did apply to a lease, some 'strange and unjust results would follow'. The landlord could retake the land and any buildings thereon for nothing. (Would not the landlord have to pay under section 1 (3) of the Law Reform (Frustrated Contracts) Act, 1943?) The tenant would have no title. And what would be the position of sub-tenants and mortgagees? It is not the estate, he concludes, that is affected, but the user.⁸⁹

Viscount Simon, L.C., could not see 'any *a priori* or absolute impossibility' why frustration should not apply to a lease, at the same time pointing out that instances of its application would be very rare.⁹⁰ As illustrations he mentioned some vast convulsion of nature which might swallow up the property, or bury it in the depths of the sea, thus causing the site to cease to exist. Again, if the lease is expressed to be for the sole purpose of building and a subsequent statute permanently prohibits in that area private building, why, said Viscount Simon, should this not bring a building lease to an end where the 'combined advantage' of the parties can no longer be fulfilled?⁹¹

Lord Wright agreed with Viscount Simon and emphasised that whereas a lease creates an estate in land, the estate is governed by the contract between the parties.⁹² The Scottish authorities afford no analogy applicable to English law because the legal background is different.⁹³ The lessee's covenants are

⁸⁷ [1945] A.C., at pp. 233, 234.

⁸⁸ [1945] A.C., at p. 245. The *Cricklewood* decision was followed by the New Brunswick Supreme Court, Appellate Division in *Foster v. Caldwell* (1948) 4 D.L.R. 70. Where the tenant of a farm covenants to pay rent without exception for fire, and barns and outbuildings are destroyed by fire which causes extensive damage, the tenant cannot escape liability for rent on the ground of frustration. Hughes, J. (at p. 73) relied upon the opinion of Lord Goddard and the observation of Lord Wright [1945] A.C., at pp. 265, 262.

⁸⁹ [1945] A.C., at p. 245.

⁹⁰ *Ibid.*, at p. 228.

⁹¹ *Ibid.*, at p. 229.

⁹² *Ibid.*, at p. 237.

⁹³ Lord Cooper, *Frustration of Contract in Scots Law* (1946) 28 *Journal of Comparative Legislation*, pp. 1-5, at p. 4; see, also, *Effect of War on Contracts*, pp. 582-585.

'generally absolute. The enjoyment and the covenant do not generally march together'.⁹⁴ But covenants may be suspended or terminated by operation of law. A lease may be forfeited if the lessee disclaim the lessor's title. These results 'flow from the general nature of the contract . . . and its application to particular conditions of fact'.⁹⁵ They do not depend upon the fact that the lease involves tenure and creates an estate in the land. 'If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it. I do not see why this may not be also true if the lease were dissolved by operation of law'.⁹⁶

Finally, it is interesting to note that in *Firth v. Halloran*,⁹⁷ a case that came before the High Court of Australia in 1926, Isaacs, J., observed (*obiter*, it is true): 'I do not agree that, because the contractual obligation relied on by the plaintiff is created by an instrument of lease, the doctrine of frustration is necessarily excluded . . . Nor do I think the consequences of terminating the relation of landlord and tenant any more extraordinary than that of terminating any other legal relation which by hypothesis is expressly or impliedly created on a mutual and fundamental basis of existence or continuance which fails at a given point. In a matter resting on covenant it is "the contract . . . and not the estate . . . which is the determining factor"'.⁹⁸

From the decision in *Jackson's Case*⁹⁹ Bovill, C.J., in the Court of Common Pleas, dissented, saying: 'If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract'. On appeal to the Exchequer Chamber, Cleasby, B., in a long and reasoned judg-

⁹⁴ [1945] A.C., at p. 239.

⁹⁵ *Ibid.*, at p. 240.

⁹⁶ But see upon this statement, the criticism of Lord Russell of Killowen, *ibid.*, at pp. 234, 235. 'But, in my opinion, the cesser or suspension of some contractual liability under the lease will not destroy the estate in land, which is vested in the lessee, unless the lease provides that in that event the term of years shall cease'.

⁹⁷ (1926) 38 C.L.R. 261, at p. 269.

⁹⁸ *Hallen v. Spaeth* [1923] A.C. 684, at p. 690.

⁹⁹ (1873) L.R. 8 C.P. 572, at pp. 580, 581.

ment, dissented also.¹ But the majority view—revolutionary in that day—prevailed and from that time to this the decision in *Jackson* is one of the judicial bases of frustration.² The doctrine has advanced even beyond the day of Lord Sumner who rested it on ‘presumed common intention’ and was averse to its extension.³ To reverse *Chandler v. Webster* took forty years.⁴ When the time arrives to deal with frustration of lease, a similar opportunity will fall to the House of Lords.

¹ (1875) L.R. 10 C.P. 125, at pp. 128, 131, 132.

² (1873) L.R. 8 C.P., at p. 581; (1875) L.R. 10 C.P., at p. 125.

³ *Bank Line Ltd. v. Arthur Capel & Co.* [1919] A.C. 435, at pp. 455, 459.

⁴ [1904] 1 K.B. 493, reversed in *The Fibrosa Case* [1943] A.C. 32; see *Effect of War on Contracts*, Chap. 24.

ESTATE AGENTS AND THE LAW

E. R. H. IVAMY

WILLES, J., in *Curtis v. Nixon*¹ said: 'These actions by house agents spring up at every turn and as they are generally based upon agreements which they have persuaded people who are not so well versed in the law as themselves to enter into to their injury, they ought not to be encouraged'.

This was, however, in 1871 when the profession was not organised. Since then many profound changes have taken place in the conditions under which such agents operate, and these are due in the main to the watchful eyes of the Royal Institution of Chartered Surveyors and of the Chartered Auctioneers' and Estate Agents' Institute which have undoubtedly raised the standard of professional conduct in agency transactions, to the mutual advantage of all concerned.

Nevertheless, the matter still remains a complicated one, as is evidenced by the various cases which have come before the courts in the past few years, each of which has dealt in some measure with new situations as they arise, and the problem of balancing the competing interests of the estate agent and his client is truly a current one.

To set this in perspective this paper has been designed to deal with three topics:—

- (1) The authority of estate agents.
- (2) The duties of estate agents.
- (3) The circumstances in which commission is payable.

THE AUTHORITY OF ESTATE AGENTS

An estate agent obviously has power to do any act which is expressly authorised by the principal. But we have now to consider what acts he may do without such express authority. Suppose an owner of property puts it into the hands of an agent, stating a price, and gives him particulars of the property to enable

¹ (1871) 24 L.T. 706, at p. 708.

him to inform intending purchasers, but provides no instructions as to the absolute disposal. Can the agent in such circumstances enter into a contract of sale with a third party so as to bind his principal?

This question has frequently come before the courts and although each case depends on its own facts in that the particular instructions alone have to be considered, the general principle that can be derived is that he has no such authority.² In *Chadburn v. Moore*³ a comparison was made between the position of a house agent and a broker on the Stock Exchange in this respect. Kekewich, J., in giving judgment said⁴: 'A house or estate agent is in a different position owing to the peculiarity of the property with which he has to deal, which does not pass by a short instrument as stocks and shares do, but has to be transferred after investigation of title, and in accordance with strict laws. An agent for sale of real estate must be more formally constituted than a seller of stocks and shares and securities of a similar nature'.

If the agent does enter into a binding contract on behalf of the principal, the principal will succeed in an action for specific performance by the purchaser because the 'principal reserves his final right to accept or refuse' the purchaser's offer.⁵ The agent who thus exceeds his authority can be sued for breach of warranty of authority,⁶ unless his act is ratified by his principal.⁷ As has been indicated above, all the circumstances of the case must be looked at. In *Rosenbaum v. Belson*⁸ it was held that where instructions were given by an owner of real estate to an agent to sell the property, and the owner agreed to pay him a commission on the purchase price accepted, the agent could enter into a binding contract, and sign an agreement for sale. In giving judgment Buckley, J.,⁹ said that counsel for the owner

² *Hamer v. Sharp* (1874) L.R. 19 Eq. 108, at p. 112; *Thuman v. Best* (1907) 97 L.T. 239; *Pemberton v. Wire* (1854) 23 L.T. O.S. 345; *Lewcock v. Bromley* (1922) 127 L.T. 116; *Prior v. Moore* (1887) 3 T.L.R. 624.

³ (1892) 61 L.J.Ch. 674.

⁴ *Ibid.*, at p. 675.

⁵ *Ibid.*, at p. 676.

⁶ *Wragg v. Lovett* [1948] 2 All E.R. 968.

⁷ For ratification generally, see *Kelner v. Baxter* (1886) L.R. 2 C.P. 174; *Keighley v. Durant* [1901] A.C. 240; *Re Tiedmann* [1899] 2 Q.B. 66.

⁸ [1900] 2 Ch. 267.

⁹ *Ibid.*, at pp. 268, 270.

'went so far as to contend that an agent for sale has not authority to sign a contract unless express authority to sign a contract, as distinguished from authority to sell, is proved. In my opinion this is not the law. The authority in the present case is in the terms: "Please sell for me my house, and I agree to pay you a commission on the purchase price accepted". This is an authority to sell. A sale *prima facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing. I do not find anything in the circumstances of this case which induces me to say that the word "sell" here means less than this. . . . Authorising a man to sell means an authority to conclude a sale, authorising him to find a purchaser means less than that—it means to find a man willing to become a purchaser, not to find him and also make him a purchaser'.

On the other hand, in *Prior v. Moore*,¹⁰ where the owner instructed an estate agent to place the property on his books, and informed him of the lowest price acceptable, it was held that the agent had no authority to sell. Similarly, in a case which concerned the sale of a colliery, an agent who was to act 'in and about the purchase', had no power to make a binding contract.¹¹ Again, where an advertisement appeared in a newspaper that applications 'to treat and view the property' were to be made to an agent, no authority to conclude a sale was given to him.¹²

Even where the estate agent is authorised to sell, he has no authority to make a contract with special conditions. In *Keen v. Mear*¹³ the agent signed a contract for the sale of a house containing provisions for 'a good and sufficient title to be given'. The court held that the principal could not be bound by such a contract, and Russell, J., in giving judgment said¹⁴: 'But had he [the agent] authority to sign the particular contract here in question? I think not. It contains a special condition as to title which might or might not be less favourable to a vendor than the title required under an open contract. . . . It is no part of an estate agent's duty to deal with title: indeed as a rule (as was

¹⁰ (1887) 3 T.L.R. 624.

¹¹ *The Vale of Neath Colliery Company v. Furness* (1876) 45 L.J.Ch. 276, at p. 278.

¹² *Godwin v. Brind* (1868) 39 L.J.C.P. 122 n.

¹³ [1920] 2 Ch. 574.

¹⁴ *Ibid.*, at p. 579.

the fact in this case) the estate agent would know nothing about the title to the property which is placed in his hands for sale'.

The most recent case on the authority of an estate agent which has come before the courts is *Wragg v. Lovett*,¹⁵ where Lord Greene, M.R., delivering the judgment of the Court of Appeal, purports to sum up the present position. He says¹⁶: 'We must not be understood as suggesting that when a vendor merely authorises a house agent to "sell" at a stated price he must be taken to be authorising the agent to do more than agree with an intending purchaser the essential (and, generally, the most essential) term, *i.e.*, the price. The making of a contract is no part of an estate agent's business, and although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language'. In the court of first instance, the judge understood the decision in *Keen v. Mear*¹⁷ as not excluding the making of a contract containing terms not less favourable to the vendor than those of an open contract. Commenting on this, Lord Greene continued¹⁸: 'We may however point out (1) that the words of Russell, J., . . . suggest to our minds that he meant to limit the authorisation in such a case to an authorisation to make an open contract, and to exclude a consideration whether a term inappropriate to an open contract was or was not more beneficial to the vendor; (2) that an open contract is a thing certain, whereas the question whether or not a particular stipulation is more or less beneficial to the vendor may, in the complications of English conveyancing, be a question of great difficulty which could only be resolved by litigation; and (3) we are not clear that the special provision as to the date of completion [inserted in the contract in question] was, in fact, more beneficial to the vendor than would have been the corresponding provision under an open contract. To say that a simple authority to make a contract allows a house agent to insert any terms he pleases, provided that they are ultimately held to be more beneficial to the vendor, appears to us to be a proposition which requires careful examination'.

Even where the estate agent is authorised to sell, he has no

¹⁵ [1948] 2 All E.R. 968.

¹⁶ *Ibid.*, at p. 969.

¹⁷ *Supra*, n. 13.

¹⁸ [1948] 2 All E.R. 968, at p. 970.

authority to receive payment of the purchase money from the purchaser.¹⁹ His authority to make statements concerning the property was discussed in *Mullens v. Miller*,²⁰ where Bacon, V.C., said²¹: 'I think the principal does thereby authorise his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorises the agent to state any fact or circumstance which may relate to the value of the property'.

THE DUTIES OF ESTATE AGENTS

When a prospective vendor puts his house in the hands of an estate agent, it might be thought that the agent is under a duty to advertise the property immediately, or at least within a reasonable time, but this is not so. In *Luxor (Eastbourne) Ltd. v. Cooper*²² it was pointed out by Lord Russell of Killowen that the relationship of master and servant does not arise, and the agent cannot be compelled to do anything at all, for, he said²³: 'Contracts by which owners of property, desiring to dispose of it, put it into the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts and contracts of employment, by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it'.

Perhaps the primary function of the estate agent, instructed to find a purchaser, is to submit to the principal all offers he receives from a prospective purchaser, and this duty lasts until a binding contract has been entered into between the parties. In *Keppel v. Wheeler*²⁴ agents were employed by the owner to sell his property. The agents gave particulars to a tenant of the property, and procured an offer from a prospective purchaser,

¹⁹ *Mynn v. Joliffe* (1834) 1 Mood & R. 326.

²⁰ (1882) 22 Ch.D. 194.

²¹ *Ibid.*, at p. 199.

²² [1941] A.C. 108, H.L.

²³ *Ibid.*, at p. 124.

²⁴ [1927] 1 K.B. 577, C.A.

which they communicated to the owner, and he accepted it — ‘subject to contract’. Later the tenant approached the agents, saying that he was willing to purchase the property at a higher price from the prospective purchaser to whom the property was — eventually sold. The agents thought that their duty ended when the owner had accepted ‘subject to contract’, but on their being sued for breach of duty in not disclosing the higher offer to the — owner, it was held by the Court of Appeal that they were liable. Bankes, L.J., said that their duty did not terminate until contracts had been exchanged between the parties, and that ‘though they were not bound to look out for other purchasers . . . it was their duty to communicate any offer which came to them, larger or more satisfactory than the one which they had already sub- — mitted to their principal’.²⁵

A similar view was expressed by Atkin, L.J., who showed that the agent is bound to make full disclosure of any events which might influence the vendor, in addition to the notification of a higher offer before the binding contract had been entered into. As the learned Lord Justice illustrated²⁶: ‘. . . supposing after they [the agents] had introduced a purchaser ready and willing to purchase, but, the matter still being in negotiation, they discovered that the person so introduced was either a person who was insolvent, or a person of bad character, or a person who intended to employ the premises for some purpose contrary to law, or perhaps contrary to the conditions in the vendor’s agreement, then it appears to me plain that it would be their duty to their principal to disclose those facts to him. On the other hand, supposing that the purchaser, while still in negotiation, applied to the agents for further particulars of the property, in order to complete the negotiations, which particulars had been entrusted to the agents by the vendor for the purpose of imparting to prospective purchasers, then, in my opinion, they would be committing a breach of their duty to their principal, the vendor, if they declined to give those particulars on the ground that they owed no further duty to anybody in the matter. And if the proposed sale went off because of that refusal, the principal, the vendor, might have a substantial cause of complaint against the agents’.

²⁵ [1927] 1 K.B. 577, C.A., at p. 586.

²⁶ *Ibid.*, at p. 590.

Further instances were given by Sargant, L.J.,²⁷ who said that if the agents 'receive information—whether as in this case from someone with whom they had originally communicated on behalf of their principal, or from some outside source, which tends to show that the value of the property was greater than had been supposed, or is otherwise of a nature to influence the judgment of their principal in going on with, or ceasing to go on with, the contract, which was being originally negotiated, they are bound to communicate that information to their principal; and if they do not do so they are guilty of a breach of their duty as agents. If [they] had heard, two days after the formation of this agreement "subject to contract", that the property had been scheduled to be taken for the purposes of a public improvement,²⁸ or that some other event had happened, quite disconnected with the agency, which necessarily increased the amount which the vendor might expect to obtain, then it seems to me that they would be definitely bound, in their capacity as agents for sale for this vendor, to communicate that information to him'.

An estate agent, like other paid agents, must conform with the standard of care and skill shown by similar agents in similar transactions,²⁹ and this standard may be proved by expert witnesses.³⁰ Thus the agent, when asked to find a tenant, must find someone who is both fit and solvent. In *Hayes v. Tindall*³¹ Cockburn, C.J., said that³² 'the agent must use reasonable care and diligence in ascertaining the character of a person before he introduces him, and not take to the landlord a person respecting whom he has made no inquiries'. The agent cannot escape liability for negligence by showing that his principal himself was at fault. In *Smith v. Barton*³³ the plaintiff employed the defendant, who was an auctioneer and publican's valuer, to negotiate for him the purchase of a tavern called 'The Ship' which the

²⁷ *Ibid.*, at p. 593.

²⁸ *E.g.*, *Price v. Metropolitan House Investment Agency Co., Ltd.* (1907) 23 T.L.R. 630, C.A.

²⁹ *Beal v. South Devon Rly.* (1864) 3 H. & C. 337, Ex.Ch.; *Solomon v. Barker* (1862) 2 F. & F. 726; *Harmer v. Cornelius* (1858) 5 C.B. N.S. 236.

³⁰ See Phipson, *Law of Evidence* (8th ed.), p. 378.

³¹ (1861) 4 L.T. 403.

³² *Ibid.*, at p. 404.

³³ (1866) 15 L.T. 294; for the method of computing damages in case of an excessive valuation, see *Baxter v. Gapp (F. W.) & Co., Ltd., & Gapp* [1939] 2 K.B. 271, C.A.

defendant had recommended. The plaintiff swore that the defendant had represented the trade of the tavern as worth from £50 to £60 a month, and that he had thereby been induced to purchase it for £130. He kept possession for a fortnight, and found the receipts amounted to not more than 4s. to 10s. a day. The defendant said that he did not know the amount of business done, that he advised the plaintiff to go to 'The Ship' on different evenings and see for himself the amount of trade done, and that the plaintiff had done so, and that therefore he himself was not liable. This defence was, however, rejected by the court, which held that he was under a duty to make himself acquainted with the real takings of the business.

If the agent himself wishes to buy the property he must tell the principal all the material facts, and make a full disclosure. It is not enough for him to tell the principal that he is going to have an interest in the purchase or to have a part in the purchase.³⁴ If a sale takes place, even after such full disclosure, it is clear that the agent will not be entitled to any remuneration.³⁵ If the owner of the property finds that the agent has received a bribe from the purchaser, he can rescind the contract of sale,³⁶ recover damages from both the agent and the purchaser, and the amount of the bribe.³⁷

For the purposes of the civil law a bribe means the payment of a secret commission, which means (1) that the person making the payment makes it to the other person with whom he is dealing; (2) that he makes it to the other person knowing that that person is acting as the agent of the other person with whom he is dealing; and (3) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.³⁸ Whether or not the mind of the agent is affected by the bribe is immaterial, for 'a contrary doctrine would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe, and further the real evil is not the payment of the money but the secrecy attending it'.³⁹

³⁴ *Dunne v. English* (1874) L.R. 18 Eq. 524, at p. 533.

³⁵ *Salomons v. Pender* (1865) 12 L.T. 267.

³⁶ *Salford Corporation v. Lever* [1891] 1 Q.B. 168.

³⁷ *Nant y Glo & Blaina Ironworks Co. v. Grave* (1878) 12 Ch.D. 738.

³⁸ *Industries & General Mortgage Co. v. Lewis* [1949] 2 All E.R. 573, at p. 575; see, further, E. R. H. Ivamy, 'The Bribery of Agents' (1949) 16 *The Solicitor*, pp. 245-248.

³⁹ *Shipway v. Broadwood* [1899] 1 Q.B. 369, at p. 372.

If the agent accepts a secret commission the principal is justified in dismissing him instantly, and the agent loses all rights of remuneration.⁴⁰ Further, if a principal dismisses his agent, the fact that the former did not know of the secret commission at the time of dismissal is immaterial if such grounds for dismissal in fact existed.⁴¹ When the agent is bribed by a gift of property, he must repay the highest value of the property whilst in his possession⁴²: although, if the bribe consists of money the sum must be handed over to the principal together with interest.⁴³ In some cases, however, no damage is suffered by the principal, and in such a case whether actually harmed or scatheless, he is conclusively presumed to have been damnified to an extent measured by the amount of the secret profit received by the agent.⁴⁴ In a civil action proof of corruptness or corrupt motive is unnecessary.⁴⁵ Both the person who offers the bribe and the agent who accepts the offer, render themselves liable to prosecution under the Prevention of Corruption Act, 1906, the maximum penalties being two years' imprisonment and/or a fine of £500, or on summary conviction four months' imprisonment and/or a fine of £50.⁴⁶ The attitude of the courts towards corruption is perhaps best summed up in the words of Sir Gerald Dodson, the Recorder of London: 'Corruption is a cancer upon commercial life, and it is the duty of the law to endeavour to restrain it. It is necessary that it should be understood that corruption means imprisonment when it is discovered'.⁴⁷

The agent must ensure that no personal interest of his own conflicts with his duty.⁴⁸ This situation arose in the interesting

⁴⁰ *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch.D. 339.

⁴¹ *Bulfield v. Fournier* (1894) 11 T.L.R. 62.

⁴² *Re Morvah Consols Tin Mining Co.: McKay's Case* (1875) 2 Ch.D. 1.

⁴³ *Re Drum Slate Quarry Co.* (1885) 55 L.J.Ch. 36; cf. Companies Act, 1948, s. 331 (1).

⁴⁴ *Re Reading's Petition of Right* [1949] 2 All E.R. 68, at p. 70. Affirmed by H.L., [1951] 1 T.L.R. 480.

⁴⁵ *Hovenden & Sons v. Milhoff* (1900) 83 L.T. 41, at p. 43; *Industries & General Mortgage Co., Ltd. v. Lewis* [1949] 2 All E.R. 573.

⁴⁶ Section 1. The consent of the Attorney-General is required before proceedings are commenced. For the effect of the Criminal Justice Act, 1948, s. 29 (3) (a) on the Prevention of Corruption Act, 1906, and the jurisdiction of quarter sessions, see *R. v. Middlesex Quarter Sessions, ex p. D.P.P.* [1950] 1 All E.R. 916, D.C.

⁴⁷ *The Times* newspaper, September 23, 1949.

⁴⁸ *Rowland v. Chapman* (1901) 17 T.L.R. 669, at p. 670, where one of the purchasers of land who acted as an agent for all the purchasers in negotiating the purchase received a commission on the amount of the purchase money from the vendor, and it was held that there was no conflict, because his interest was to obtain the land as cheaply as possible.

case of *Harrods Ltd. v. Lemon*,⁴⁹ where an owner of property employed the estate agency department of Harrods to find a purchaser. They introduced her to a third party who, quite unknown to the estate agency department, had employed the company's building department to inspect the drains of the property and give an estimate for putting them in order. The court assumed that there was a conflict between the agents' duty and interest, but found that Messrs. Harrods, as soon as they discovered that they had been acting for both parties, suggested to the owner that she should invite the proposed purchaser to accept an independent survey of the drains. This offer was not accepted by the owner, who completed the sale with full knowledge of the agent's breach of duty. In these circumstances the court held that the agents were still entitled to their commission.⁵⁰

WHEN COMMISSION IS PAYABLE⁵¹

Two of the questions which the prospective vendor has to consider are: 'what is the rate of commission?' and 'when is it payable?'. The answer to the first question is simple. In the absence of express agreement there is an implied agreement to pay a reasonable sum. In practice this situation rarely arises, for the scale of charges is always brought to his notice, and he is deemed to have accepted them.⁵² The answer to the second question is more difficult.

The prospective vendor will generally be given a document showing the circumstances in which the agent states that commission will be payable, and it is vitally important that he should read the terms very carefully, for the contract in question must be construed separately in each case, and little help is afforded by the construction adopted in similar contracts. Thus, in *Luxor (Eastbourne) Ltd. v. Cooper*,⁵³ Lord Simon, L.C., said⁵⁴: 'There is, I think, considerable difficulty and no little danger in

⁴⁹ [1931] 2 K.B. 157, C.A.

⁵⁰ See the judgment of Romer, L.J., at p. 171. Cf. *Thornton Hall & Partners v. Wembley Electrical Appliances Ltd.* [1947] 2 All E.R. 630.

⁵¹ Valuable surveys of the present position are contributed by L. C. B. Gower in (1950) 13 *Modern Law Review*, pp. 491-499, and Spencer G. Maurice in (1950) 14 *The Conveyancer*, pp. 274-294.

⁵² E.g., 5 per cent on the first £300, 2½ per cent on the next £4,700, and 1½ per cent on the remainder.

⁵³ [1941] A.C. 108, H.L.

⁵⁴ *Ibid.*, at p. 119.

trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each case is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms'. In the same case Lord Russell of Killowen said⁵⁵ : 'Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of contract. No general principle can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question and upon the true construction of those terms'.

A similar view was expressed by Lord Wright,⁵⁶ who pointed out that 'What is in question in all these cases is the interpretation of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions in one contract may help by way of analogy and illustration in the decision of another contract. But however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made . . . It is important to simplify as far as possible the problem of construing commission agency agreements, especially in regard to the sale of houses and land. These are of common occurrence among all classes of the community, and it is most undesirable that subtleties and complications of interpretation, calculated to lead to disputes, should be allowed to confuse what is *ex facie* a plain and simple agreement'.

If there is any doubt as to the construction of the words used, the court may resort to the *contra proferentem* rule, so that words are construed in favour of the principal, because the terms of the relationship between him and the agent have been drawn up by the latter.⁵⁷ It has been said in *Luxor (Eastbourne) Ltd. v.*

⁵⁵ *Ibid.*, at p. 124.

⁵⁶ *Ibid.*, at p. 130.

⁵⁷ *Murdoch Lownie Ltd. v. Newman* [1949] 2 All E.R. 783, at p. 788 (*per* Slade, J.) and *Dennis Reed Ltd. v. Goody* [1950] 1 All E.R. 919, at p. 926 (*per* Hodson, J.).

*Cooper*⁵⁸ that 'it is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognised that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying", some term not expressed, but necessary to give to the transaction such efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties'.

Therefore, unless it is specifically agreed to the contrary, the putting of a house into the hands of an agent for sale does not prevent the owner from selling the house himself, or from selling it through another agent.⁵⁹ Thus, in *Bentall, Horsley & Baldry v. Vicary*⁶⁰ an owner of property appointed estate agents as his 'sole agents' for a stipulated period. During the period of the agency the owner disposed of the house himself. The estate agents claimed damages for breach of contract, on the ground that in selling the property direct to the purchaser he had deprived them of their commission. But the court held that there could be no implied term that the owner should not carry out the sale himself. McCardie, J., in giving judgment said⁶¹: 'If the parties intended such a prohibition, nothing would have been easier than to insert the appropriate words'. But the owner should be careful to see that words, giving the agent 'the sole

⁵⁸ [1941] A.C. 108, at p. 137. Cf. *The Moorcock* (1889) 14 P.D. 64, at p. 68; *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q.B. 488, at p. 491, where Lord Esher, M.R., says: 'The court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication, in the sense that I have mentioned'.

⁵⁹ *Brinson v. Davies* (1911) 27 T.L.R. 442.

⁶⁰ [1931] 1 K.B. 253. See, also, *E. Christopher & Co. v. Essig* [1948] W.N. 461; 92 S.J. 675.

⁶¹ *Ibid.*, at p. 258. For the measure of damages for breach of a contract of sole agency, see *Hampton & Sons Ltd. v. George* [1939] 3 All E.R. 627.

right to sell', do not appear in the terms of the agency agreement, because in such an event he must not employ another agent, and cannot sell the property himself.⁶²

No liability, of course, will be incurred by the owner if he withdraws the property from the agent's control before the introduction of a prospective purchaser.⁶³ When the prospective vendor and purchaser enter into negotiations as a result of being brought together by the estate agent, and these negotiations are broken off, commission may be payable if they are recommenced and a contract concluded. The agent must prove that he has been the 'effective cause' of the transaction, and obviously this must be a question of fact in each case.⁶⁴ No commission will be payable when the agent buys the property himself with the consent of the principal.⁶⁵ If the agent is employed to find a purchaser no commission will be payable if a Secretary of State, in the exercise of his statutory powers, acquires the property compulsorily.⁶⁶ In the absence of an express contract the agent cannot recover on a *quantum meruit* for the cost of advertising the property.⁶⁷

We come now to a consideration of various clauses used by estate agents, and the construction which has been placed upon them by the courts. Once more it must be emphasised that the owner of the property should read very carefully the circumstances proposed by the agent under which commission will be payable.

(1) 'On securing for you an offer'

This is a new formula which appears to have been recently adopted by estate agents, and it is one of which the owner of

⁶² *Chamberlain & Willows v. Rose* (1924), referred to in [1931] 1 K.B. 261.

⁶³ *E. P. Nelson & Co. v. Rolfe* [1949] 2 All E.R. 584, at p. 587 (*per* Cohen, L.J.), but see *infra*, p. 320.

⁶⁴ *Green & Another v. Mules* (1861) 30 L.J.C.P. 343, at p. 344; *Mansell v. Clements* (1874) L.R. 9 C.P. 139; *Lofts v. Bourke* (1884) 1 T.L.R. 58; *Barnett v. Brown & Co.* (1890) 6 T.L.R. 463; *Burton v. Hughes* (1885) 1 T.L.R. 207; *White & Others v. Lucas* (1887) 3 T.L.R. 516; *Thompson Rippon & Co. & Others v. Thomas* (1895) 11 T.L.R. 304, C.A.; *Steere v. Smith* (1885) 2 T.L.R. 131; *Coles v. Enoch* [1939] 3 All E.R. 327.

⁶⁵ *Hocker v. Waller* (1924) 29 Com.Cas. 296; *Salomons v. Pender* (1865) 12 L.T. 267.

⁶⁶ *G. T. Hodges & Sons v. Hackbridge Park Residential Hotel Ltd.* [1940] 1 K.B. 404, C.A.

⁶⁷ *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108. Cf. *Prickett v. Badger* (1856) 1 C.B.N.S. 296.

property must be particularly wary. It covers the class of case 'in which the agent is promised a commission by his principal, if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether the principal accepts the offer and carries through the bargain or not'.⁶⁸ In *Bennett, Walden & Co. v. Wood*,⁶⁹ the construction of 'securing for you an offer' came before the court, but, on the facts of the case, it was held that the word 'offer' meant a firm offer and not one 'subject to contract', and so no commission was payable. Sir Raymond Evershed, M.R., said⁷⁰: 'Applying the proper test of construction, viz., what is the ordinary straightforward meaning of the language, it seems to me reasonably clear that the answer here is that by "offer" is meant a firm offer. In the ordinary sense of the term in business matters, an offer is something which by acceptance creates a bargain. An offer "subject to contract" lacks that essential characteristic, for its acceptance does not create a contract'. In this case the Master of the Rolls did not state what would be the precise result if a firm offer had been made, and, for one reason or another, the contract so confirmed had broken down at a later stage because this point had not to be decided. In any event, however, the owner should beware, because by agreeing to such a formula as stated above he may render himself liable to pay more than one commission in respect of the same subject matter.

(2) '*In the event of business resulting*'

This was the formula which the court had to interpret in *Murdoch Lownie Ltd. v. Newman*.⁷¹ Three different constructions of the words used were placed before Slade, J., for his consideration. Did they mean that the right to commission accrued (a) on the introduction by the agents of a party who was ready, willing and able to purchase the property on terms acceptable to the vendor; (b) on the introduction of a party who

⁶⁸ *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108, at p. 120 (per Lord Simon, L.C.).

⁶⁹ [1950] 2 All E.R. 134.

⁷⁰ *Ibid.*, at p. 137.

⁷¹ [1949] 2 All E.R. 783.

entered into a binding contract with the vendor for the purchase of the property; or (c) on the introduction of a party, who not only entered into a binding contract for the purchase of the property, but who actually completed the purchase? Slade, J., held that the words were neither clear nor unequivocal and, on the facts of the case, said that he was satisfied that on their true construction the right to commission should not accrue until the agent had introduced at least a person who had entered into a binding contract, and that this event had not occurred in the case in question.

The learned judge went on to say⁷²: 'Whatever the expression "binding contract" may mean, it must, in my view, at least mean a contract which is binding on the party introduced by the agent in return for the commission, which he is called on to pay. In some of the reported cases a "binding contract" is looked on from the point of view of whether it binds the vendor. I think that "binding contract" means a contract which binds both parties, *i.e.*, which is a contract, and is clothed with the necessary form to make it an enforceable contract in law. But whether that be so or not I am satisfied that the expression envisages a contract which, against the party introduced by the agent, the vendor is entitled to have specifically performed, or for whose breach he is at least entitled to recover damages'. Owing to the ambiguity of this formula it is unlikely that it will be widely used by estate agents.

(3) '*On the introduction of a person ready, able and willing to purchase*'

These words have given rise to a spate of decisions as to their correct interpretation. In general, it may be said that this is a dangerous term for the intending vendor to assent to, because he may be liable to pay commission even though the property is not eventually sold.

In *E.P. Nelson & Co. v. Rolfe*⁷³ it was not disputed that the party was ready, willing and able to purchase, and the court held that the commission was payable as soon as the introduction had been effected. There are *dicta* to be found in the judgments

⁷² *Ibid.*, at p. 789.

⁷³ [1949] 2 All E.R. 584. Cf. *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108, at p. 129 (*per* Lord Russell of Killowen).

of Bucknill, L.J., and Cohen, L.J., that the principal will not be liable to pay commission if, before the introduction, the property is withdrawn, or the property has already been sold, or he has entered into a contract to sell to somebody else. If, however, at the time of introduction the property is not for sale because the owner withdraws it by reason of some arrangement not binding in law, but binding morally or as a matter of business, the estate agents will still be entitled to their commission.⁷⁴

This case, however, has been distinguished and doubted by the Court of Appeal in *Dennis Reed Ltd. v. Goody & Another*.⁷⁵ Here almost the same formula was used,⁷⁶ and after the 'introduction' the proposed purchaser withdrew, and the agents were held not entitled to their commission. Bucknill, L.J.,⁷⁷ held that the agents must prove that the proposed purchaser was ready, able and willing to purchase up to the time when an enforceable contract for the purchase of the house was made between the parties, or, alternatively, up to a time when the defendants refused to enter into such a contract on terms, on which the proposed purchaser was willing to purchase, and the proposed vendor was at one time willing to sell.

A different view is expressed by Denning, L.J., when he says that⁷⁸ 'the words "upon your introducing" do not mean that commission becomes due at the moment of introduction.⁷⁶ The introduction takes place when the order to view is given, and no one knows then whether the person introduced will like the house or not. The words "upon your introducing" cannot, therefore, signify the time when an agent becomes entitled to commission, but can only signify the services to be rendered by the agent. Now whom must the agent introduce? He must introduce a person ready, willing and able to purchase . . . these words do not mean a person ready, able and willing "to make an offer" or even "to enter into a contract". They mean a person ready, able and willing "to purchase", i.e., to complete

⁷⁴ [1949] 2 All E.R. 584, at pp. 586-587.

⁷⁵ [1950] 1 All E.R. 919, C.A. It has also been criticised by Denning, L.J., in *McCallum v. Hicks* [1950] 1 All E.R. 864, at p. 866.

⁷⁶ In *Nelson v. Rolfe* (*supra*) the actual words were: 'I will pay immediately upon such introduction', and this distinction may have been in the mind of Denning, L.J.

⁷⁷ *Dennis Reed Ltd. v. Goody & Another* [1950] 1 All E.R. 919, at p. 922.

⁷⁸ *Ibid.*, at p. 924.

the purchase.⁷⁹ He must be a person who is "able" at the proper time to complete, *i.e.*, he must then have the necessary financial resources. He must also be "ready", *i.e.*, he must have made all necessary preparations by having the cash or a banker's draft ready to hand over. He must also be "willing", *i.e.*, he must be willing to hand over the money in return for the conveyance'. This interpretation means that the special clause has practically the same effect as the usual terms on which an estate agent is employed, and, later, Denning, L.J., distinctly says of the purchaser: 'He must, I think, be willing up to the time for completion, unless he has been previously absolved by the vendors' withdrawal from the contract'. Hodson, J., the third member of the court, does not appear to have indicated clearly at which period of time the person has to be willing.

It is difficult to see how the ability and willingness of the intending purchaser can be different according to whether the vendor accepts or rejects him. Denning, L.J., appears to equate the words 'person ready, willing and able to purchase' with 'purchaser', but this, too, is difficult to follow because obviously the former has proceeded far less on the road to completion than the latter.⁸⁰ Moreover, there seems no logical reason why commission should not be payable if the estate agent has drafted the formula in this way, even though a purchase never takes place, and even if it is the proposed purchaser who withdraws. If the proposed vendor accepts such a term, he has only himself to blame. In any case, even if the criticism is not justified, the need is apparent for a definite ruling as to the time down to which the person must remain ready, willing and able.

It has been held in *Graham & Scott (Southgate) Ltd. v. Oxlade*⁸¹ that a person was not willing and able to purchase when he made an offer 'subject to contract and satisfactory survey'. Cohen, L.J., said⁸²: 'I think that the agent may prove that a person he has introduced is willing to purchase the property by showing that that person has made an unqualified offer, or expressed an unqualified intention to make an offer, notwith-

⁷⁹ Cf. *James v. Smith* [1931] 2 K.B. 317, at p. 322, where Atkin, L.J., says: 'In my opinion, the purchaser must be willing and ready, that is to say able up to the time he signs the contract'.

⁸⁰ See 100 L.J. 381, at p. 396.

⁸¹ [1950] 1 All E.R. 856 (overruling *Giddys v. Horsfall* [1947] 1 All E.R. 460).

⁸² *Ibid.*, at p. 861.

standing that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified to prevent the other party turning the offer into a contract by acceptance, I think it is impossible to say that the agent has discharged the onus which rests on him of proving that the person he has introduced was willing to purchase the property'. On the other hand, he said that if the phrase 'subject to contract' was introduced by the vendor in accepting an unqualified offer, it clearly would not be fatal to the agent's claim.⁸³

(4) '*Find me a purchaser or someone to buy*'

This is the type of case, referred to by Viscount Simon, L.C., in *Luxor (Eastbourne) Ltd. v. Cooper*,⁸⁴ in which 'by the express language of the contract the agent is promised his commission only upon completion of the transaction, which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him'.

In this case the agent will be entitled to commission only if a binding contract of sale is entered into between the parties, and until this stage is reached either party may withdraw and no liability to pay commission will be incurred.⁸⁵ As Denning, L.J., has said⁸⁶: 'When a house owner goes to a house agent and asks him "to find a purchaser", that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters. If the sale is not completed the agent

⁸³ [1950] 1 All E.R. 856, at p. 861. Cf. *Dennis Reed Ltd. v. Goody* (*supra*), and, also, *Alfred Pearson & Son v. Swinford* (1951) 157 *Estates Gazette* 172.

⁸⁴ [1941] A.C. 108, at p. 120; see, also, *Grogan v. Smith* (1890) 7 T.L.R. 132, at p. 133; *Lott v. Outhwaite* (1893) 10 T.L.R. 76, C.A.; *Passingham v. King* (1898) 14 T.L.R. 392; *Chapman v. Winson* (1904) 91 L.T. 17, C.A.

⁸⁵ [1941] A.C. 108, at p. 154 (*per* Lord Romer).

⁸⁶ *McCallum v. Hicks* [1950] 1 All E.R. 864, at p. 865. But see the later remarks of Denning, L.J., in *Dennis Reed Ltd. v. Goody* [1950] 1 All E.R. 919, at p. 923.

gets no commission, unless he has procured an actual binding and enforceable contract for purchase. Once the purchaser and vendor have signed and exchanged a contract, the agent has earned his commission, because if the purchaser does not complete, the vendor can recover the amount of the commission from the purchaser by way of damages'. But, in *Fowler v. Bratt*⁸⁷ Sir Raymond Evershed, M.R., though saying that the agent had to produce a purchaser bound in law to buy, found it unnecessary to decide whether the vendor too had to be bound by law to sell.

The difficulties inherent in the subject will be apparent from the brief review of the cases set out above. The solution of the problem as to when commission is payable would appear to lie in the passing of a short statute, whereby freedom of contract would be limited, and no commission be due except out of the purchase price. In the event of no parliamentary time being available, all prospective vendors should be encouraged to refuse to sign any agreement with an estate agent unless such a specific term is expressly incorporated into it.

⁸⁷ [1950] 1 All E.R. 662, at p. 663. Cf. Slade, J., in *Murdoch Lownie Ltd. v. Newman* (*supra*).

SOME RECENT DEVELOPMENTS IN DIVORCE LAW

DENNIS LLOYD

It is perhaps hardly an exaggeration to say that the report of a Royal Commission often proves to be a mode of burying a problem by those to whom it is addressed, though at the same time it may point the road to progress for a future generation. Thus it need occasion no surprise that the recommendations of the Royal Commission on the Divorce Laws, which reported in 1912, had to wait for implementation until 1937, and even then only as the result of the happy accident that Oxford University chose as one of its burgesses a man who combined remarkable ability, resource and pertinacity, together with a deep sense of the misery wrought by the puritanical limitations of our divorce laws. The energetic and inspired persistence of the independent Member for Oxford—it is, of course, of Sir Alan Herbert, better known as A.P.H., that I write—served to illustrate that our legislative system is flexible enough to permit even of miracles. For is it anything short of a miracle that a newly elected independent member was able, at a time of national crisis—by the irony of history the poignant drama of the Abdication took place during the Bill's passage through Parliament—to secure the enactment of a measure touching upon one of the most controversial of social problems; one, indeed, going to the roots of society itself?¹

More than twelve years have gone by since the Matrimonial Causes Act of 1937 passed into law, and gave this country some title to be regarded, in the matter of divorce, as a progressive community. The theory enshrined in the earlier legislation, that marriage was an institution which could be frustrated only by adultery, and that one single act of adultery was of greater consequence in law than a lifetime of cruelty, inflicted under the most disgusting and humiliating circumstances, was hardly a

¹ For an account of the history of the passage of the Bill, see A. P. Herbert, *The Eyes Have It* (1937) referred to hereinafter as 'A.P.H.'.

moral pedestal of which a civilised nation could be proud.

The Act of 1937 extended the grounds of divorce to cover matrimonial offences other than adultery, and also provided for a decree of divorce to be obtainable in two instances where nothing resembling an offence had been committed, *viz.*, in the case of lunacy, and also where a spouse is judicially presumed to be dead.² It is too soon to attempt to assess the social consequences of this vital measure, but even its most resolute opponents would not attribute the whole of the recent remarkable increase in the volume of divorce to the misdirected energies of Sir Alan Herbert. A note to the Annual Abstract of Statistics for 1948, where the divorce figures of the preceding ten years are set forth, adds the cautious comment that the increase since 1938 is *to some extent* due to the introduction of the 1937 Act. With this we can hardly quarrel, for, no doubt, it was the purpose of that particular piece of legislation to produce some increase in the number of decrees. Fate willed it, however, that this liberating enactment was soon coupled with the relaxed moral atmosphere engendered by a major war, and which resulted in a quite phenomenal rise in the number of divorces during, and especially after, the war period.

As I have chosen to study the legal development in the law of divorce since the 1937 Act, it may be pertinent to preface it with such factual background as statistics can supply. For, without deluding ourselves that statistics tell us much about individual cases, it remains true that it is only in the light of these legions of wrecked homes that it is possible to grasp the overwhelming social significance of the rules applied by our courts in the exercise of their divorce jurisdiction.

In 1937, then—the last pre-A. P. Herbert year—some 5,700 decrees were granted.³ In 1938 the figures rose to 7,600. Of petitions filed in this year, some 4,900 were based on adultery, 3,900 on desertion, 600 on cruelty and 300 on lunacy. In 1939 and 1940 the figures actually fell, but buoyancy was soon restored and by 1944 the numbers of decrees had risen to 14,000. In 1945 they were up to 19,000, in 1946 to 32,000 and by 1947

² Relief may be granted in this case, even though the original separation was the fault of the petitioner.

³ These statistics will be found in the *Annual Abstract of Statistics*, No. 85, p. 55; No. 86, p. 58. In 1911 there were about 1,000 divorces (see Denning Committee, *Final Report*, p. 6).

attained their peak at 52,000. Of the grounds on which petitions in 1947 were filed, adultery still led the field with 31,000, desertion being many lengths behind with 12,000, and cruelty a poor third with just over 2,000. In 1948 the decline began, the total of decrees being 40,000, the main decrease being in adultery, the figures for desertion and cruelty remaining approximately the same as in the previous year. This decline has continued, though in 1949 the number of decrees was still over 34,000, and of the petitions filed in that year those based on desertion exceeded in number those based on adultery.⁴

These figures would be startling if we had not, in the world of continual sensations in which we live, almost lost the faculty of being startled. The inescapable fact is that we now live in an age where divorce has entirely lost its social or moral stigma, where people in all walks of life are ready to discard their husbands or wives and, indeed, in some cases their children too, with hardly more compunction than that with which they would divest themselves of an ill-fitting garment.

The question for us to consider is how far the law is warranted in accepting, or indeed encouraging, this state of affairs, or whether there are measures of conservation which can be taken to prevent that disruption of society and impending doom which some gloomy prophets envisage as the inevitable consequence of the breakdown of family life. Certainly there are instances on record where a lax divorce law has been associated with a lax morality, and has worked as a corroding influence on the strength and stability of a particular society. The Roman Empire, of course, leaps to the mind as a characteristic and ominous example. At the same time we must try, I think, to preserve a balance in these matters. There is no necessary correlation between a rigid divorce law and a high degree of sexual morality. No reader of Chaucer or Boccaccio would entertain the delusion that the Middle Ages, with its profound religious convictions and its rejection of all divorce, was a period of sexual restraint and orderly family life. A liberal divorce law is, in many ways, but a facet of the liberation of women from subordination to the male. A rigid or non-existent divorce law unquestionably presses harder on women than on men, and it is therefore not without interest that in this country in 1948 the number of

⁴ No official figures are yet available for 1950.

decrees granted to husbands was almost exactly equal to those granted to wives. Could there be any more convincing evidence of present day sexual equality?

It must be remembered too that we live in an age of materialistic standards, where individual success, wealth and happiness are esteemed the greatest of blessings. When Mrs. Jones is treated to a nightly beating by her drunken husband we do not gather round and say that the pillars of society will collapse if Mrs. Jones is permitted to divorce her husband, or if she desires—in disregard of Dr. Johnson's cynical comment on a second marriage, as the triumph of hope over experience—to seek a new happiness with Mr. Smith. What we do, if I am not mistaken, is to entertain a strong feeling that she should be released from this ill-chosen bond of wedlock, and we see no reason why she should not, if she is so minded, take another ticket in the matrimonial lottery. All of which may be regarded from different angles as misguided sentimentality or enlightened humanitarianism. But one thing is certain, and that is that we cannot put the clock back. We must take our society as it is—'warts and all'—and all that the most zealous reformer can do is to try to improve the material which is vouchsafed to him.

The would-be reformers fall into two main categories—those who regard the 1937 Act as going too far, and those who think it did not go far enough. Whether there is also a section of the community that affects to be satisfied with the law as it now stands I would not venture to say. At any rate, it is a good deal less vocal than its opponents. Certainly the lawyers—who have no reason to be discontented with the activities of Sir Alan Herbert, and would be justified in erecting a memorial to his fame—would hardly oppose the according of fresh grounds of divorce.

The proposals to extend the grounds of divorce are, I think, mainly of two kinds. First, it is suggested that where the parties have been separated for a number of years—say seven⁵—by mutual consent, and it is apparent that the marriage is really to all intents and purposes at an end and incapable of resuscitation, then a divorce should be obtainable. This, of course, opens up a

⁵ The Denning Committee suggested for consideration that separation for seven years might be a ground of divorce if there is no prospect of reconciliation (*Final Report*, p. 31).

field of controversy which, very wisely, Sir Alan left well alone for fear that he might otherwise have killed his Bill stone dead.⁶ Apart from the case of lunacy, both the Royal Commission of 1912 and the 1937 Act are squarely based on the theory that divorce involves an order made against a guilty party in favour of an innocent party. To concede that voluntary separation might ripen into divorce would inevitably involve the recognition of divorce by mutual consent.⁷ At the same time we must not allow ourselves to be frightened by a bogey or allow an important problem to be settled by reciting a form of words as a slogan. For there are ways, apart from lunacy, which is a special instance in which the law is beginning to recognise that the function of the divorce law is not merely to punish the guilty, but also to relieve the innocent. I will revert to this a little later on.

For the moment I want to mention the second proposed new ground of divorce, *viz.*, where a matrimonial offence has been committed, but the injured party refuses to take proceedings, whether on account of personal spite, religious conviction, or the hope of reconciliation. The Royal Commission had attempted to deal with this situation by proposing that where application was made for a judicial separation on grounds which would have justified a divorce, the court should have power to insist on granting a divorce rather than a separation. This would not, however, meet the case where the injured spouse declined to take proceedings at all, and the same objection would apply to Sir Alan Herbert's provision in his original Bill—which was dropped in committee—that after two years *either* party could apply for the order of separation to be converted into a divorce.⁸

The proposal that the guilty party should be able to take advantage of his own wrong against the will of the injured party

⁶ See *A.P.H.*, pp. 54–56.

⁷ See the views expressed in the recent House of Lords debate on the proposal for a Royal Commission (*The Times* newspaper, November 24, 1950). Since this lecture was delivered a private member's bill to enable divorces to be granted after seven years voluntary separation has received a second reading. The Government has countered by agreeing to appoint a Royal Commission on divorce (see *The Times* newspaper, March 10, 1951), a proposal which had previously been rejected (*ibid.*, November 24, 1950).

⁸ *Ibid.*, p. 56 ('Very far from the region of practical politics'). Where a decree *nisi* of divorce has been granted and the petitioner then applies for a decree of judicial separation to be substituted for it, the court has a discretion not to accede to this application but to make the decree *nisi* absolute: see *Jeffrey v. Jeffrey* [1950] 2 All E.R. 449.

is certainly one that is not lightly to be accepted, at any rate without the most stringent safeguards. There is, however, much to be said for the suggestion that if the injured party has gone so far as to get a judicial separation, and the passage of years thereafter shows that there is no prospect of reconciliation, then it is better to accept the realities of the situation and to allow either party to apply for a divorce.⁹ As long ago as 1906 Sir John Gorell Barnes, President, observed: 'It is desirable, in my judgment, to express the conviction which has forced itself upon me that permanent separation without divorce has a distinct tendency to immorality and is an unsatisfactory remedy to apply to the evils it is supposed to prevent.'¹⁰ Whether we look at the public weal, or the private woe, there really seems nothing to recommend the course of preserving a marriage between two persons for their natural lives, which has been judicially nullified and is without prospect of revival. To insist on maintaining such a marriage is to produce a state which Mr. A. P. Herbert was well justified in calling 'unholy deadlock'.

Those who are of opinion that the divorce laws should be tightened up rather than relaxed, generally take their stand upon the fate of the children of the marriage, and there are some who urge that a different law should apply to those couples who have children under 16, and to those who have not.¹¹ Certainly, even to those who are most resolute for the happiness of the parents, it cannot be a matter of indifference that the break-up of a marriage may serve to deprive the children of that comfort and security, which is alone to be found in the bosom of a contented family. But I venture to think that here again we are in danger of falling victims to a slogan. It is, of course, vital that the ship of marriage should not lightly be allowed to founder on every stray reef that it may encounter and, for this reason, there must necessarily be stringent safeguards to prevent every occasional tiff from being dramatised into a divorce suit. Such safeguards are provided by limiting the grounds for a divorce to those which are of such gravity as to entail the complete breakdown of the marriage. It is, however, a very different matter to say that,

⁹ There would, of course, have to be safeguards, so that the innocent party would not involuntarily be deprived of rights to which he or she was entitled, e.g., pensions, rights under the Inheritance Act, etc.

¹⁰ *Dodd v. Dodd* [1906] P. 189, at p. 207.

¹¹ See *Encyclopædia Britannica Book of the Year* (1949), p. 408.

after the marriage is obviously broken beyond repair, it is still necessarily beneficial to the children to try to maintain a façade of matrimonial harmony, for the purpose of affording them the illusion of a home. My own view, for what it is worth, is that, save in those cases where parents are capable of an exceptional degree of disregard for their selfish impulses, it is probably better for the children to make a clean break, rather than maintain an atmosphere of continuous bickering, discontent and unhappiness. It does seem to me that the domestic atmosphere engendered by a father and mother who have lost all regard or respect for one another, can hardly be better for the children than for them to live with one parent alone, who, at any rate, will probably do everything to provide them with as happy a home as circumstances will permit. Moreover, the rare cases I have referred to must necessarily be rare indeed, for parents given to unselfishness and self-sacrifice are not likely in any event to find themselves on the path to the divorce court.¹²

I now turn to consider more specifically a few of the recent developments in this branch of the law since the 1937 Act. Shortage of space compels me to be highly selective in this review and, in any event, I have no desire to weary you with a catalogue of cases and statutes, which you can readily find in any textbook. All I desire to do is to highlight a few currents of development which illustrate how the courts have sought to preserve a balance by, on the one hand, adopting the view that a marriage which has fundamentally failed is not deserving of conservation unless the law compels this result, while, on the other hand, refusing to regard a divorce decree as a mere perfunctory piece of machinery to be accorded to any petitioner for the asking. I propose first to deal with substantive law, and then to add a few words on procedural matters.

SUBSTANTIVE LAW

On the substantive grounds for divorce I think it is true to say that there have been no far-reaching developments since the new

¹² Mr. Bernard Shaw has suggested that the State should even reserve to itself the right to dissolve a marriage which it regards as undesirable whatever the parties to the marriage may desire or intend (see *The Times* newspaper, July 14, 1950). The doctrine of State intervention could go no further.

Act.¹³ I confine myself here to dealing with adultery, desertion and cruelty. And, first, a word about cruelty.

1. Cruelty

What is sometimes rather inaptly termed 'legal cruelty' was already a familiar conception prior to 1938, both as a ground of judicial separation and, prior to 1923, as being required in addition to adultery on a petition for divorce by a wife.¹⁴ Its definition was finally settled by the House of Lords in 1897, as conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger.¹⁵ The idea of 'mental' cruelty is, therefore, not a recent one, and the requirement that such cruelty should be shown to have had a detrimental effect on the health of the petitioner has been closely adhered to. Hence, a persistent course of nagging by a wife, where medical evidence showed that the husband's health was affected, has been held to entitle the husband to a decree.¹⁶ Cruelty is obviously a category which is capable of infinite variation, and the courts have therefore kept a firm hold upon it, and prevented it degenerating into mere 'mutual incompatibility', in two ways. First, the conduct complained of must be grave and substantial. Thus, mere neglect is not a ground of divorce, though it may be acutely painful to an aggrieved spouse. As Lord Greene, M.R., has remarked: 'The legislature has not thought fit to make the continuous

¹³ The Matrimonial Causes Act, 1950, is merely a consolidating measure which has not altered the substantive law, though it has introduced some procedural improvements.

¹⁴ Matrimonial Causes Act, 1857, s. 27; Matrimonial Causes Act, 1923, s. 1.

¹⁵ *Russell v. Russell* [1897] A.C. 395. In some of the recent cases, however, some importance has been attached to the specific wording of the 1937 Act, which introduced the phrase 'has treated the petitioner with cruelty'. See, e.g., *White v. White* [1949] 2 All E.R. 339, per Asquith, L.J., at p. 348, and *Kaslefsky v. Kaslefsky* [1950] 2 All E.R. 398, per Bucknill, L.J., at p. 402. Yet it seems hardly likely that that phraseology was inserted with the object of restricting the ambit of legal cruelty. Indeed, the definition of 'cruelty' contained in the original Bill (Clause (6)) would have made it clear that the test was objective. The definition clause was dropped because it was thought to be unnecessary (*A.P.H.*, p. 143).

¹⁶ *Horton v. Horton* [1940] P. 187; *Atkins v. Atkins* [1942] 2 All E.R. 637. Cf. *Lauder v. Lauder* [1949] 1 All E.R. 76 (decree granted to wife whose health suffered due to her husband's moody and sulky behaviour, in the course of which he would sometimes ignore his wife for days on end); *Usmar v. Usmar* [1949] P. 1.

unhappiness of one spouse caused by the unkindness, the lack of consideration, the selfishness, or even the drunken degradation of the other spouse, a ground for obtaining the dissolution of the marriage.¹⁷ On the other hand, inordinate and excessive sexual demands,¹⁸ or the refusal of sexual intercourse¹⁹ have been held to amount to legal cruelty, where the other spouse's health has suffered injury, or there is reasonable apprehension that it will do so. The second limitation is, as I have already pointed out, that where there is no physical injury or danger of injury, there must be proof of an injury to health or the likelihood of such injury.²⁰

As indicated earlier, there are signs that the courts are beginning to emphasise that divorce is not merely a form of punishment inflicted upon the guilty, but that it may also serve the more fundamental purpose of relieving the innocent. This aspect has been well illustrated by a number of recent decisions, which have considered how far it is material that the cruelty was inflicted deliberately or in a spirit of malice or malignancy. In *Astle v. Astle*²¹ Henn Collins, J., took the view that intention or malignity is an essential element in the matrimonial offence of cruelty. This view was based on the idea that cruelty is an offence comparable to criminal misconduct, and that just as a crime requires *mens rea*, so in cruelty regard must be had not merely to its effect on the victim but to the mind of the person inflicting it. On this view, the insanity of the respondent would necessarily be a complete defence to a case based on cruelty, and something much less than insanity might also suffice. Thus, in *Squire v. Squire*²² the husband's complaint was that his wife systematically prevented him from sleeping by demanding that he read to or converse with her. It was alleged that if the husband showed signs of going to sleep the wife unreasonably demanded that he should perform menial services for her, or would strip off the bedclothes from him, or would move furniture about the room or switch on the lights. The defence was that this conduct

¹⁷ *Buchler v. Buchler* [1947] P. 25.

¹⁸ *Holborn v. Holborn* [1947] 1 All E.R. 32.

¹⁹ *Raw v. Raw* [1947] W.N. 96. Or insisting on intercourse by way of *coitus interruptus*, *White v. White* [1948] 2 All E.R. 151, *Cackett v. Cackett* [1950] 1 All E.R. 677; *contra*, *Grimes v. Grimes* [1948] 2 All E.R. 147.

²⁰ But cf. note 27, *infra*.

²¹ [1939] P. 415.

²² [1949] P. 51.

was the result of the wife's illness, and was done neither malignantly nor with the deliberate intention of injuring the husband. Finnemore, J., dismissed the petition, but the Court of Appeal held that spite or deliberate intention was no necessary part of a case of cruelty, and that, though the state of health of the parties must be a relevant matter to be taken into consideration, mere distraction of mind and judgment by illness, but falling short of insanity, could not afford a defence.

Yet a further step has been recently taken by Pearce, J., in *Lissack v. Lissack*.²³ In that case the husband, while insane, killed the child of the marriage and then attempted suicide. At his trial for murder he was found guilty but insane, and his wife later petitioned for divorce, alleging cruelty. It was held that even assuming that the insanity of the husband was fully within the *Macnaghten* rules, still it was no defence to a petition for divorce based on cruelty. Since, Pearce, J., observed, in petitions based on cruelty the duty of the court to interfere is intended not to punish the husband for the past, but to protect the wife for the future, the question for the court is whether the wife can, with safety to life and health, live with the husband now. To withdraw from the ambit of legal cruelty conduct that is intolerable, but is due to insanity, would be to make the court powerless to help in cases where help might be most needed.²⁴

It must be admitted that, in seeking to strike a balance between relieving the innocent on the one hand without on the other relaxing the strict definition of cruelty, the courts have got themselves into some difficulty. This is well illustrated by the recent case of *Kaslefsky v. Kaslefsky*.²⁵ On the return of her husband from service overseas the wife refused intercourse with her husband and showed a complete neglect of her wifely duties, got up late, neglected to prepare meals for the husband or their child or to look after the child. The commissioner who tried the case found that this conduct was due not to any desire to inflict injury upon her husband, but merely because the wife was

²³ [1950] 2 All E.R. 233. In *White v. White* [1950] P. 39, the C.A. had previously held that insanity, which was less than that required by the *Macnaghten* rules, was no defence to a petition based on cruelty. Bucknill, L.J., left it open whether insanity of such a kind would be a defence, Asquith, L.J., thought it would, Denning, L.J., was of opinion that it would not.

²⁴ [1950] 2 All E.R., at p. 237.

²⁵ [1950] 2 All E.R. 398.

a sluttish and lazy type of person and further that there was no evidence that the husband's health had suffered in any way. It was held that this conduct did not amount to cruelty. It would seem from the judgments of the Court of Appeal that though there is no need to establish a malignant motive, there must at any rate be conduct which is in some way 'aimed at' the other spouse.²⁶ Such conduct need not be deliberate, having regard to the ordinary principle that a man may be presumed to intend the natural consequences of his acts, but the court is not bound to draw this inference if satisfied that it is not the correct one.²⁷ On this it seems a fair comment that it is not easy to explain why insanity is no defence if the element of intention implied in conduct 'aimed at' another is essential to cruelty. With all respect, Denning, L.J.'s explanation of *Lissack v. Lissack*—which followed his own earlier view in *White v. White*²⁸—that the presumption that where a husband has killed his child, while insane, is conclusive that he intended to inflict injury on his wife,²⁹ is rather artificial.

So long as the court has regard not merely to the effect of the conduct on the petitioner, but insists on embarking upon an investigation into the state of mind of the respondent such difficulties are inevitable. The reluctance of the court to confine itself to inquiring into the effect of the respondent's conduct on the petitioner stems, however, from fear lest the door of cruelty might be opened too wide and divorces granted for incompatibility of temperament. As Denning, L.J., said in *Kaslefsky's Case*: 'This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage is itself imperilled'.³⁰

2. Desertion

Desertion, like cruelty, has long been familiar to our courts in matrimonial causes other than divorce,³¹ and by and large the

²⁶ Cf. *Westall v. Westall* (1949) 65 T.L.R. 337.

²⁷ From Bucknill, L.J.'s judgment (with which Somervell, L.J., concurred) it appears that both conduct aimed at the spouse and injury to health, actual or probable, are required (see [1950] 2 All E.R., at p. 402). Denning, L.J., however, appears to state them as possible alternatives (*ibid.*, p. 402), and the headnote seems based on his judgment.

²⁸ *Supra*, note 23. ²⁹ [1950] 1 All E.R., at p. 463. ³⁰ *Ibid.*

³¹ As well as in divorce petitions by a wife under the Matrimonial Causes Act, 1857, s. 27, which entitled a wife to sue for divorce on the ground of adultery only if coupled with cruelty or desertion for two years.

divorce court has taken over the old learning on this subject. Many of the older cases had recognised that desertion is not to be tested merely by inquiring who left the matrimonial home first.³² For where one spouse has actually left the other but for just cause, the latter may be guilty of what is called 'constructive' desertion. Moreover, conduct short of an actual matrimonial offence such as cruelty or adultery may suffice for this purpose, as in the case where a husband has so conducted himself as to lead his wife to form the reasonable suspicion that he has been guilty of adultery, although no adultery has taken place or at any rate can be proved.³³ Since desertion has become an actual ground of divorce, the courts have displayed some uneasiness lest constructive desertion based on conduct less than legal cruelty might imperceptibly create a new cause for divorce.³⁴ It is now laid down that the conduct complained of must be of such gravity as to be equivalent to driving the petitioner from the matrimonial home.³⁵ There must be both *factum* and *animus*, but on the other hand the necessary intention will be readily inferred where the acts complained of are of a serious and convincing nature. Here, again, as in the case of cruelty, the court displays some readiness to look at the effect of the actual conduct on the aggrieved spouse, rather than conduct an inquiry into the intention of the guilty party. Thus, although it is clear that actual insanity may prevent an *animus deserendi* from arising or continuing,³⁶ the court has refused to apply the same reasoning to the case of a respondent who was a feeble minded person under the Mental Deficiency Act, 1927.³⁷

Signs of the present disinclination to extend the scope of constructive desertion are evident in *Buchler v. Buchler*,³⁸ where the husband, a farmer, had formed and persisted in an associa-

³² See, e.g., *Sickert v. Sickert* [1899] P. 278.

³³ See *Beer v. Beer* [1947] 2 All E.R. 711; *Everitt v. Everitt* [1949] 1 All E.R. 408; *Barker v. Barker* [1950] 1 All E.R. 812.

³⁴ Per Lord Greene, M.R., in *Buchler v. Buchler* [1947] P., at p. 29.

³⁵ It is now settled that neither spouse has the right to dictate where the matrimonial home shall be (*Dunn v. Dunn* [1948] C.L.Y. 925). Hence, if there is a dispute as to where the home is to be, and both parties act unreasonably, neither party will be able to rely on desertion (*Walter v. Walter* (1949) 65 T.L.R. 680).

³⁶ *Williams v. Williams* [1939] P. 365, distinguished by Denning, L.J., from the case of cruelty, on the ground that desertion requires a specific intent, *White v. White* [1949] 2 All E.R., at p. 351.

³⁷ *Brown v. Brown* [1947] 2 All E.R. 160.

³⁸ [1947] P. 25.

tion with one of his farm hands which, while in no way sexually improper, caused his wife great distress and aroused comment among friends and neighbours who suspected homosexuality. The wife frequently objected but the husband's reply was that if she did not like it she could 'clear out'. This was held by the Court of Appeal not to amount to constructive desertion in favour of the wife. In *Weatherley v. Weatherley*³⁹ the House of Lords held that the mere persistent refusal of sexual intercourse did not justify the aggrieved spouse from leaving the matrimonial home and then pleading constructive desertion. Indeed, the Lord Chancellor thought that it might still be open to the House in some future case to consider whether there was sufficient warrant for the whole doctrine of constructive desertion.⁴⁰ More recently the Court of Appeal has again emphasised that there can be no constructive desertion without an intention to bring cohabitation to an end.⁴¹ Further, a spouse will not be presumed conclusively to intend the natural consequences of his act, where such an intention is negated by the facts themselves, as where an habitual criminal or drunkard behaves so badly that his wife is forced to leave him, though the evidence shows that he is really devoted to his wife and earnestly desires her to remain with him.⁴²

3. *Adultery*

There is little to be said under this head save in relation to the question of proof.⁴³ The vast increase in the number of cases now before the courts, and the many instances where the evidence of inquiry agents has necessarily to be relied upon, has, on the whole, caused such witnesses to be viewed with less disfavour than hitherto. The testimony of such witnesses, formerly referred to by the unflattering name of *testes lupanares*, while tolerated, if only just, was regarded as subject to special

³⁹ [1947] 1 All E.R. 563. But cf. *Rice v. Raynold-Spring-Rice* [1948] 1 All E.R. 188. And such refusal might amount to cruelty if the other spouse's health suffers, *Raw v. Raw* [1947] W.N. 96.

⁴⁰ [1947] 1 All E.R., at pp. 564-565.

⁴¹ *Hosegood v. Hosegood* (1950) 209 L.T. Journal, p. 194.

⁴² *Ibid.*, per Denning, L.J.

⁴³ The C.A. has recently (*Gower v. Gower* [1950] 1 All E.R. 804) expressed doubts as to the correctness of *Ginesi v. Ginesi* [1948] P. 179, where it was held that adultery must be proved with the same strictness as is required to establish a criminal charge. But cf. *Bates v. Bates* [1950] 2 All E.R. 458.

scrutiny. It is, perhaps, not incorrect to say at the present day that the courts recognise that these gentlemen are performing a necessary function, that theirs is an honest if not excessively meritorious occupation, and that there is no real reason why they should not be believed upon their oath. One factor in this development may be that in many poor persons' cases, conducted by the Law Society's solicitors, inquiry agents have had perforce to be employed in order to establish proof of adultery.

As for the so-called 'hotel cases' these too have, not without justice, been regarded as falling under a good deal of suspicion on account of the possible collusion that lurks behind them. It is a fairly open secret that the greater part of them stem from an unavowed arrangement between the parties. Such an arrangement, of course, involves both connivance and collusion, each of which is in itself an absolute bar to obtaining a decree. In fact, however, the case as presented, with the customary ritual of the husband's letter enclosing the hotel bill, the evidence of the waiter or chambermaid, and the entry in the hotel register, is treated, in the absence of special circumstances, as raising a clear presumption of adultery and, notwithstanding the statutory duty imposed on the court 'to be satisfied' that there is no collusion or connivance,⁴⁴ the court now rarely regards such a case as suspicious enough to prevent its being satisfied of the absence of these absolute bars.⁴⁵ The same applies to solicitors and counsel concerned with such proceedings, who are expected to act upon such evidence, at any rate provided the client is discreet enough, as he or she usually is, to relate to them a version which goes no further than what I have termed the 'customary ritual' and staunchly omits to disclose, or denies, the existence of any arrangement with her erring spouse.

It was one of the avowed aims of the 1937 Act to diminish the number of such cases by extending the grounds of divorce to enable parties to obtain a decree based on the genuine wrong inflicted upon them. Unless, however, such grounds are made far more comprehensive than is either likely or desirable, there is always bound to be a residue of cases where the parties are resolved upon a divorce and determined to go to any lengths

⁴⁴ 1937 Act, s. 4.

⁴⁵ For some of the pre-1937 decisions, see Rayden, *Divorce* (5th ed.), pp. 93-94.

to obtain it. A court which can do no more than act on the uncontested evidence before it is hardly in a position to impede this process, nor can the cumbersome procedure of the King's Proctor's office, by the selection of a few random cases for investigation, provide an effective deterrent. Those who can see no genuine social purpose or benefit in maintaining a marriage that is already a total wreck, may regard this loophole, in what must necessarily be a rigid branch of law, as a vital escape route which, if it did not exist, would have to be invented. The insoluble problem seems to be to find an alternative escape route, that can be pursued without the perjury and deception which inevitably tend to bring the legal process into contempt and disrepute.

While on the subject of bars to a decree of divorce, I would only add that an interesting and characteristic development has recently occurred with regard to the practice in a case where the petitioner has himself been guilty of adultery.⁴⁶ Up till the war period, the convention was maintained that where a petitioner admitted adultery with another person with whom he had been living and whom he intended to marry if a decree were granted, the parties had nevertheless to remain apart from the moment of the presentation of the petition until the decree absolute. The practice, however, began to change after it was held in 1940 that this was not to be treated as a universal rule, for circumstances might exist due to poverty or the interests of the children of the union which would render it inappropriate.⁴⁷ It would seem at the present day that, provided the parties express a genuine intention to marry if a decree is granted, the court no longer attaches any importance to their cohabitation during the proceedings.

The duty of a solicitor to make clear to his client not merely the necessity for disclosing his or her own adultery when petitioning for divorce, but also to ensure that the client understands the nature of the matters put to him, has recently been the subject of judicial observation.⁴⁸ It may surprise the more worldly among us that a learned judge had himself met reasonably well educated and well informed business men and women who

⁴⁶ For the modern rules now governing the exercise of the discretion of the court, see *Blunt v. Blunt* [1943] A.C. 517.

⁴⁷ *Andrews v. Andrews* [1940] P. 184; cf. *Reeves v. Reeves* [1940] P. 28.

⁴⁸ *Barnacle v. Barnacle* [1948] P. 257.

honestly thought that adultery consisted in having sexual connection with a woman not your wife, who is not over fifty years of age; and that it is not adultery if she is over fifty. Other instances, no less surprising, given by Wallington, J., which have come to the notice of the King's Proctor, are: 'I did not think it was adultery during the daytime'; 'I thought it meant getting a girl into trouble'; and 'I thought it meant drinking with men in public houses'.⁴⁹ If the state of public ignorance on these matters is so abysmal, it is well that solicitors should be warned not to wrap up their questions in language which may lead to such unfortunate misunderstandings.

PRACTICE AND PROCEDURE

Some of the more significant developments since the war have been not in the substantive law of divorce but in procedural matters. Here, of course, the labours of the Denning Committee constitute a major landmark. Space will only permit me to make a very brief mention of one or two of the more important recommendations of that committee, not all of which have been implemented.⁵⁰ Many regard the proposal to introduce a reconciliation procedure into the High Court as the real core of the Final Report, but this seems, at any rate for the time being, to have been definitely dropped. A word or two on this matter would however not be out of place here. The committee were very impressed by the excellent work already performed by the probation officers in the magistrates' courts in effecting reconciliation between warring spouses.⁵¹ They therefore recommended that a Marriage Welfare Service should be set up to afford help and guidance both in preparation for marriage and also in the difficulties after marriage and, further, that welfare officers should be appointed to give advice with a view to reconciling those who have resorted to the Divorce Court or contemplate doing so.⁵²

Such a scheme has long been favoured by many social workers,

⁴⁹ *Ibid.*, p. 261.

⁵⁰ Thus it is impossible in the space of this lecture to treat of the many valuable improvements in the minutiae of procedure (*e.g.*, as to the mode of service of a petition) proposed by the Committee, and for the most part now implemented under the new Matrimonial Causes Rules, 1947. (For the proposals, see *Second Interim Report* of the Denning Committee, 1946, Cmd. 6945.)

⁵¹ Especially under the Summary Procedure (Domestic Proceedings) Act, 1937.

⁵² *Final Report*, pp. 13-16.

and indeed the original draft of Sir A. P. Herbert's Bill contained a clause—devised by Mr. Claude Mullins—for introducing an apparatus of conciliation into divorce proceedings. This proposal was dropped on the committee stage, for fear of imperilling the Bill itself,⁵³ and in commenting upon the course taken on this matter Sir Alan has observed that 'conciliation, like divorce itself, was a horse that an eager rider might ride too hard'.⁵⁴ The real danger of a comprehensive conciliation procedure is that by trying to achieve too much it may stultify itself. It must be acknowledged that the greater majority of cases which reach the Divorce Court are much too far gone for any court official or social worker to restore the broken fabric. This is not to say that there may not be marginal cases where such a procedure could be effective and, admittedly, considerable effort is warranted in attempting to save even a moderate percentage of the vast number of broken marriages which come before the courts. I would venture to suggest, however, that the meagre results likely to be achieved might be a poor return for the elaborate apparatus which the individual investigation of the circumstances of some twenty or thirty thousand cases a year would entail, apart from the difficulty of finding suitable personnel to man the service, especially at the rate of pay which the Treasury is likely to regard as appropriate.⁵⁵

As against this it may be urged that probation officers have achieved noteworthy success in the police courts. True, but their range of activities is very much wider and, so far as matrimonial cases are concerned, they frequently have an opportunity of bringing their influence to bear before the breakdown of the marriage has become irreparable. Moreover, by and large, the people they deal with belong to the poorer and less educated section of the population. I think it very doubtful how far such a procedure could be suitably applied to other sections of the community. Consequently there would, in my view, be some

⁵³ *A.P.H.*, pp. 62–63.

⁵⁴ *Ibid.*, p. 61.

⁵⁵ There is more to be said for the Committee's proposal that the welfare officers should have special duties in cases where there are dependant children, and in particular that the court could refer such cases to them for inquiry and report. The Lord Chancellor has now appointed a court welfare officer in London to look after the interests of the children in divorce cases, but has declined to support the suggestion that investigation by such an officer should be required in all cases (see *The Times* newspaper, December 13, 1950).

considerable danger that an elaborate and costly judicial machinery might end up by doing little more than go through the motions of a defined procedure in a perfunctory manner, and be regarded—as, indeed, has occurred in some other countries⁵⁶—as merely a further stage in obtaining a decree of divorce.

Of those recommendations of the Denning Committee which have since been implemented, either fully or to some extent, I would draw attention to the following:—

1. *The decree absolute*

The period between decree *nisi* and decree absolute is now reduced from six months to six weeks.⁵⁷ The committee did not support the total abolition of the decree absolute, as it was felt that its retention still gave the King's Proctor an opportunity to intervene in an appropriate case.⁵⁸ Those who think that the office of the King's Proctor is an inquisitorial survival which could well be dispensed with, will hardly be convinced by this reasoning.

2. *Divorce commissioners*

To the petitioner in the divorce courts, the most conspicuous change is that commissioners, consisting of county court judges and King's counsel, now sit regularly in London and the provinces to hear both defended and undefended cases.⁵⁹ This has effected an uncommon speed-up in the lists so that an undefended case can now be disposed of within as little as a month, if it does not present any special complications. In order to continue to surround divorce cases with the aura of High Court dignity the commissioners are given the full status of High Court judges, including their rate of pay, while performing this duty. But whereas the county court judges for this purpose wear High Court judge's robes, the other commissioners still continue to wear their ordinary K.C.'s robes.

3. *The rule in Russell v. Russell*⁶⁰

This odd rule, which was said to be founded on 'decency,

⁵⁶ *E.g.*, in France.

⁵⁷ See *Matrimonial Causes (Decree Absolute) General Order*, 1946, S.R. & O., 1946, No. 1305.

⁵⁸ *Final Report*, p. 27.

⁵⁹ This arose out of the recommendations of the *Second Interim Report*, see pp. 7-12.

⁶⁰ [1924] A.C. 687.

morality and policy', might have been regarded as no more than a quaint illustration of English hypocrisy, if it were not for the manifest inconvenience to which it gave rise. The inconsistency of the rule is sufficiently shown by a case where the only evidence of adultery is that a child has been born to the wife, though no intercourse has taken place with the husband within the possible period of conception. In such a case the husband was debarred from giving evidence of non-access to his wife, though this did not prevent his calling third parties to prove his continuous absence from his wife at the material period where this was possible.⁶¹ Hence, in many of the service cases after the war, where the husband was serving overseas, it has been possible to prove by the independent evidence of Army records that there was no possibility of intercourse at the material time.⁶² Happily, Parliament has recently acted upon the committee's recommendation that the rule should be abolished, and has thus relegated this topic to the sphere of legal history.⁶³

4. Jurisdiction

It has long been a legitimate grievance of the feminists that the rigid rule of English law which automatically ascribes the domicile of a husband to his wife frequently produces great hardship to the wife if she wishes to institute divorce proceedings. Piecemeal reforms had already been introduced by the 1937 Act in the case where a husband had deserted his wife and immediately before the desertion was domiciled in England,⁶⁴ and also in the case of war marriages under an Act of 1944.⁶⁵ The Denning committee, however, rightly pointed out that these reforms were inadequate to meet many other instances of hardship, such as a case where an English woman marries a foreigner in England and goes with him to his native country, and soon after is deserted by the husband and so returns to her relatives in

⁶¹ *Clarkson v. Clarkson* (1930) 46 T.L.R. 623.

⁶² Cf. *Andrews v. Cordiner* [1947] K.B. 655.

⁶³ Law Reform (Miscellaneous Provisions) Act, 1949, s. 7. See now Matrimonial Causes Act, 1950, s. 32. The problem of what constitutes a possible period of gestation, still remains a very troublesome one in the present state of expert medical testimony: see *Hadlum v. Hadlum* [1948] 2 All E.R. 412 (349 days not impossibly long); *Clark v. Clark* [1939] 2 All E.R. 59 (174 days not too short); and *Preston-Jones v. Preston-Jones* [1951] 1 All E.R. 124 (360 days held by H.L. to justify inference of adultery).

⁶⁴ Section 13.

⁶⁵ Matrimonial Causes (War Marriages) Act, 1944.

England. In such a case it was necessary for her to go back to her husband's country in order to obtain a divorce. Here again, Parliament has now very largely eliminated hardships such as these, by enacting that the jurisdiction of the English divorce court shall extend to cover the case where the wife is resident in England, and has been ordinarily resident there for the three years immediately preceding the commencement of the proceedings.⁶⁶ That this provision will not, however, meet all possible cases of hardship is illustrated by a recent decision where an English woman married a Canadian airman serving in England in 1943, and lived with him in England until 1949, when the parties went to Canada with the idea of trying to settle there. After five months together in Canada the wife returned to England and petitioned for divorce on the ground of cruelty. It was held that the petition must be dismissed as the husband's domicil was Canadian, and the five months' stay in Canada disentitled the wife from saying that she was ordinarily resident in England during the three years immediately preceding the petition.⁶⁷ It would, therefore, be necessary in such a case for the wife to wait for three years after her return to this country before instituting the proceedings.

In summing up the arduous labours which bore fruit in the Matrimonial Causes Act of 1937, Sir Alan Herbert has referred to the nineteen volumes of *Hansard*, containing some 340,000 words, in the course of which that Act was debated, amended and finally approved. 'I have not counted', writes Sir Alan, 'how many times it was said that we were setting England on the slippery slope'.⁶⁸ 'The Act', he adds, writing in 1937, 'may not be perfect—but there it is. Parliament has spoken—let us wait, with patience and fair play, to see what it has done'.⁶⁹ I would offer the opinion that few of those familiar with its workings would deny that the Act has performed, whatever its defects, a great work of social justice, and that our judges have administered the Act in a liberal and enlightened spirit, yet not unmindful of that 'slippery slope' of which its initiator heard so much and which the would-be reformer is never likely to be permitted to forget.

⁶⁶ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (i) (a). See now Matrimonial Causes Act, 1950, s. 18.

⁶⁷ *Hopkins v. Hopkins* [1950] 1 All E.R. 1035.

⁶⁸ *A.P.H.*, p. 195.

⁶⁹ *Ibid.*, p. 199.

NEW TOWN PLANNERS AND THE LAW

RICHARD C. FITZGERALD

As the Barlow Commission pointed out, 'The concentration of population in the great towns, especially since the Industrial Revolution of more than a century ago, has been marked by a disastrous harvest of slums, sickness, stunted population, and human misery from which the nation suffered in mid-Victorian years, and continues, though fortunately to a much lesser extent, to suffer today.'¹

No one would seriously contend that the vast, and ever increasing, concentrations of population found in London, Manchester, and Glasgow, to mention only three of the great urban centres in Great Britain, are really necessary for the prosperity of Great Britain. The Second World War has answered the question put by the Barlow Commission as to whether these vast concentrations constitute a danger to national defence.² The evacuation of a large part of the population of London, because of the outbreak of war, was clear evidence that the Government considered the concentration of approximately one-sixth of the country's population in London to be a danger to national defence, and the developments in the means to wage war that have taken place since 1945 have increased the dangers of vast concentrations of population.

Parliament has now taken steps to lessen the evil. Modern planning legislation has introduced the principle of 'positive' or 'dynamic' planning, and has put planning on a 'national', as opposed to a 'local', basis. The New Towns Act, 1946, is part of our present planning legislation, and some aspects of that Act will be considered in this paper. Before doing so, a word or two should be said about previous experiments in decentralisation and dispersal of population.

Way back in 1898 Sir Ebenezer Howard published his

¹ *Report of the Royal Commission on the Distribution of the Industrial Population* (1940), Cmd. 6153, p. 8, para. 16.

² *Ibid.*

Tomorrow, a Peaceful Path to Real Reform. His concept of a garden city was a new self-contained town, separated from any existing urban unit by a protecting belt of open land, which was to offer properly planned facilities for industry, residence of inhabitants of various grades of society, and cultural and recreational opportunities. He also considered it desirable that the whole area selected for the site of the new town should be in the single ownership of the body undertaking the development, and that the profits derived from the land ownership, after providing for a certain maximum return on the capital invested, should be used for the benefit of the inhabitants.³ Two garden cities definitely embodying Howard's ideals have come to life—Letchworth in 1903, and Welwyn in 1920.⁴

A satellite town should be distinguished from a garden city, since the former, although a development on garden city lines, is planned in the neighbourhood of, and is to some extent dependent on, an existing large town. According to the Barlow Commission, the two outstanding examples of satellite towns are Wythenshawe and Speke, developed respectively by the Corporations of Manchester and Liverpool⁵ in 1927 and 1928 respectively. Their primary function was to meet rehousing requirements in connection with large and crowded municipalities, and they were created by local authorities, whereas Letchworth and Welwyn were created by ordinary commercial companies and are complete towns and experiments in social living.

Thus, for nearly half a century enlightened persons and organisations in Great Britain have been trying to cope with the problem of the spread of urban centres, with the attendant problems of overflow of boundaries and the formation of sprawling agglomerations of humanity. The experience gained from these enterprising experiments cannot fail to be of considerable benefit to those called upon to create new towns under the New Towns Act, 1946, to some of the provisions of which Act we will now turn.

MINISTERIAL POWERS AND DUTIES

The Act contains no definition of the expression 'new town'.

³ *Ibid.*, p. 127, para. 271, citing the 1935 Report of the Departmental Committee, presided over by Lord Marley, which investigated the subject of garden cities and satellite towns.

⁴ *Ibid.*, p. 9, para. 21.

⁵ *Ibid.*, p. 128, para. 272.

The expression may, in some respects, be misleading, as it might be thought that it means a completely new town established on hitherto undeveloped land. That is certainly not the case, as it is expressly provided that the site of a new town may include any existing town or other centre of population,⁶ and as a matter of fact, the practice seems to be to provide new towns by developing already existing towns.⁷

If the Minister⁸ is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under the Act, he has power to make an order designating that area as the site of the proposed new town.⁹

Parliament, however, has prescribed the procedure to be followed by the Minister when making a designation order.¹⁰ Stated briefly, and looking at the matter from the standpoint of the ordinary citizen, the Minister must prepare a draft order describing the area to be designated as the site of the proposed new town by reference to a map, together with such statement as he considers necessary for indicating the size and general character of the proposed new town. He must then publish in the *London Gazette*, in one or more newspapers circulating in the locality in which the proposed new town will be situated, and in any other newspapers he considers appropriate, a notice describing the area to be designated; stating that he is about to consider the draft order he has prepared; naming the place where a copy of the draft order and statement can be seen at all reasonable hours, and specifying the time, being not less than twenty-eight days from publication of the notice in the *London Gazette*, in which objections to the proposed order may be made. If any objection is duly made to the proposed order and is not withdrawn, the Minister must, before making the order, cause a public local inquiry to be held with respect thereto, and must consider the report of the person by whom the inquiry is held.

⁶ s. 1 (3).

⁷ For example, Stevenage, Crawley, Hemel Hempstead, Harlow, Aycliffe, Easington, Welwyn Garden City, and Hatfield. The order given here of these towns is based on the dates on which the designation orders for these towns were made.

⁸ I.e., the Minister of Town and Country Planning, s. 26 (1).

⁹ s. 1 (1).

¹⁰ s. 1 (2), and the First Schedule to the Act.

Provided that he follows this procedure, the Minister is entitled to make the order either in terms of the draft or subject to such modifications as he thinks fit, but he must not, except with the consent of all persons interested, modify the order so as to include any land not designated in the draft order.

After making the order, the Minister must publish in the *London Gazette*, and in newspapers of the character just mentioned, a notice stating that the order has been made and naming a place, within the area designated by the order as the site of the proposed new town, where a copy of the order may be seen at all reasonable hours.¹¹

This procedure looks reasonable enough. It provides for consultation; a ministerial statement; notice to the general public; a right of the general public to inspect the draft order and ministerial statement; a right to object; the holding of a public local inquiry if an objection is duly made; and service of appropriate notices on interested persons and bodies. But its reasonableness is superficial, as the following survey of the legal position discloses.

In *Rollo and Another v. Minister of Town and Country Planning*,¹² two residents in Crawley questioned the validity of an order made by the Minister, namely, the Crawley New Town (Designation) Order, 1947. The three main submissions made by the objectors in support of their submission that the order was not within the powers of the New Towns Act, 1946, were, (1) that the Minister failed to give sufficient information in regard to the proposed new town; (2) that the Minister did not have proper consultation with the local authorities concerned; and (3) that no proper local inquiry was held.¹³ The ministerial statement accompanying the draft order read as follows: 'At this preliminary stage the intention is that the proposed new town of Crawley shall, when fully developed, be self-contained

¹¹ A like notice to the pre-order notice published in the *London Gazette* must be served by the Minister on the council of the county and of the county district in which the land, or any part thereof, to which the order relates, is situated, and on any other local authority who appear to him to be concerned with the order: First Schedule, para. 2. A like notice to the post-order notice must be served on all local authorities who were served with the pre-order notice, and also on an objector to the proposed order who has made a written request to the Minister to be served with a copy: First Schedule, para. 5.

¹² [1947] 2 All E.R. 488. Affirmed [1948] 1 All E.R. 13.

¹³ *Ibid.*, at p. 489.

in that accommodation will be provided for a total population of about 50,000 and that a proper balance will be maintained between industrial and residential development'. The objectors thought that this statement was inadequate, in that it did not (*inter alia*) give any proper information, and that consequently they were deprived of the opportunity of adequately presenting their objections. The Minister swore an affidavit, deposing that the statement contained all the information which he considered necessary for indicating the size and general character of the proposed new town, and, indeed, was the only information for that purpose which he was in a position to give at that date. The Minister went into the witness box, and, in the course of cross-examination to which he was subjected, agreed that the words used to describe the size and general character of some proposed other new towns under the Act were virtually the same as those used in the instant case. He explained that the reason was that all the proposed new towns intended to be created to meet the problem of dispersal from London had the same common features as to size and general character. Morris, J., said he saw no reason to doubt that the Minister gave all the information he was in a position to give or to doubt that he gave all that he considered necessary.¹⁴ The Minister had, therefore, satisfied the statutory requirement, and the objectors had not substantiated their complaint.

The learned judge expressed the following views concerning the statement to be made by the Minister (pursuant to his statutory duty)¹⁵ for indicating the size and general character of the proposed new town, *viz.* :—

1. The statement is to be such as the Minister considers necessary. It is not such a statement as the court considers necessary.¹⁶

2. It is immaterial whether the Minister can give more information than he does in the statement, so long as he gives all that he honestly considers necessary.

3. If the Minister gives all the information which he has, the statutory requirement will not be satisfied unless that is all that he considers necessary to indicate size and general character.

¹⁴ [1947] 2 All E.R. 488, at p. 491.

¹⁵ First Schedule, para. 1.

¹⁶ [1947] 2 All E.R. 488, at p. 490.

In other words, the test appears to be: Has the Minister done all that *he* honestly considers necessary? If he has, then, even though a court of law thinks the statement for indicating the size and general character of the proposed new town is inadequate, an objector has no remedy, unless one regards parliamentary criticism of the Minister as a remedy. 'The Minister is not charged with the duty of presenting a detailed picture of how the future town will look'.¹⁷

The next question considered in the *Rollo Case* was whether the Minister had proper consultation with the local authorities concerned. One meeting between the Minister and local authorities selected by him took place about three weeks before August 1, 1946 (the date on which the New Towns Act, 1946, received the Royal Assent and came into operation), and the objectors contended that no meeting before August 1, 1946, could be regarded or relied upon as being a consultation which complied with the provisions of the statute. On the facts of the *Rollo Case* it was unnecessary to decide this point, but the views of Morris, J., are instructive. He said he could find no warrant in the Act for the submission that consultation must take place between August 1, 1946, and the preparation of the draft order. 'It may well be that consultation before such preparation would be fruitful and satisfactory, but, in my judgment, the only statutory stipulation is that consultation, with such local authorities as appear to the Minister to be concerned, should precede the making of a decision by the Minister whether he is satisfied that it is expedient in the national interest that any area of land should be developed as a new town by a development corporation, and the making of an order designating such area as the site of the proposed new town'.¹⁸ Morris, J., went on to say that he saw no reason 'why a consultation, if otherwise fully effective, should not avail even though it took place in anticipation of legislation. The consultation in such a case would not at the time be held pursuant to any statute, but no question of the retrospective operation of a statute would arise. The position would simply be that the Minister had, in fact, held a consultation which had enabled him to derive the assistance which consultation could yield to him, but a consideration of this question

¹⁷ *Ibid.*, at p. 494.

¹⁸ *Ibid.*, at p. 494.

would depend on the precise facts of each particular case'.¹⁹ The Court of Appeal, when it dealt with the appeal from the judgment of Morris, J., left the question open, Lord Greene, M.R., stating he could see various considerations which would have to be taken into account before the court could lay down a proposition that a consultation before the Act became an Act satisfies the statutory requirement.²⁰

It was said on behalf of the Minister in the *Rollo Case* that, if a local authority states that it is not interested in a proposal to designate a site, the Minister need not further consult them. This point did not call for actual decision in the *Rollo Case*, but Morris, J., expressed²¹ his views on it and on other aspects of the Minister's statutory duty to consult local authorities when proposing to make an order designating a site for a new town, and they may be summarised as follows:—

1. The holding of consultation with such local authorities as appear to the Minister to be concerned is an important statutory obligation.

2. The Minister, with receptive mind, must, by such consultation, seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved.

3. Though the Minister cannot extract advice if there is a refusal by a local authority to tender it, it remains the duty of the Minister to do all in his power to hold consultation with those local authorities which appear to him to be concerned in a proposed site.

4. Even if local authorities themselves do not contend that they have not been consulted, it is still open to others to put forward that contention.

5. The statutory duty of the Minister to consult does not disappear, or is not performed, merely because a local authority takes the opportunity to make a statement at a public local inquiry.

6. The Act does no more than prescribe that the consulta-

¹⁹ [1947] 2 All E.R. 488, at p. 494.

²⁰ [1948] 1 All E.R. 13, at p. 15.

²¹ [1947] 2 All E.R. 488, at p. 496. The views set out in Nos. 6 and 7 (*supra*) were expressed by Morris, J., in *Fletcher v. Minister of Town and Country Planning* [1947] 2 All E.R. 496, at p. 500. The *Fletcher Case* centred round the draft Designation Order made for Hemel Hempstead.

tion with local authorities must take place before a final order is made. If consultation precedes the making of a final order, the terms of the Act have been satisfied.

7. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. In deciding whether consultation has taken place, regard must be paid to the substance of the events.

To these views may be added an eighth, that of Bucknill, L.J., expressed when the *Rollo Case* came before the Court of Appeal, *viz.*:—

8. Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.²²

These judicial views should be regarded as invaluable advice by the Minister and by those responsible for advising him, as a disregard of them in any particular case might be held by the courts to amount to a failure to comply with all the requirements of the Act, and so enable the courts to quash the Minister's order.

It should be mentioned that the Court of Appeal affirmed the judgment of Morris, J., in the *Rollo Case*, the whole point in the appeal turning on the meaning to be placed on the word 'consultation'.²³ Lord Greene, M.R., in the course of his judgment, made some comments which I think, and hope, will not meet with universal approval. He rightly pointed out that the Minister has sources of information and assistance which are not open in any sense to any particular local authority or any group of local authorities. 'For instance, in deciding on the national interest in relation to a particular area, he has the advantage of consultation with a number of government departments. The Minister of Transport can advise him on the question of roads and railways, and the Minister of Health can advise him on the question of housing, the possibilities of

²² [1948] 1 All E.R. 13, at p. 17.

²³ *Ibid.*, at p. 14.

housing, water, drainage, and matters of that kind'.²⁴ He then went on to say: 'Bearing that in mind, when he comes to consult with the local authorities in the district, he would, I venture to think, be, or might be, wasting a great deal of time if he were expressly to ask their opinion on matters of which they could know very little. It would not be much use his asking them whether they thought that something which he had obtained from the Minister of Health or the Ministry of Transport, on a subject about which they could not know anything, was in accordance with their ideas'.²⁵ I venture to suggest that local authorities know quite a lot about housing and transport, and, in any event, it is always highly desirable to obtain as many opinions as possible on information supplied, and views expressed, by Ministers.

The third submission of the objectors in the *Rollo Case* was, as already mentioned, that no proper local inquiry was held, but the decision of the House of Lords in *Franklin v. Minister of Town and Country Planning*²⁶ prevented their succeeding in regard to this contention. In the *Franklin Case*, which centred round the Stevenage New Town (Designation) Order, 1946, the House of Lords unanimously held that the Minister's duties under section 1 of the Act and the First Schedule to the Act, these being the duties we have so far considered, are purely administrative.²⁷ As the Minister has no judicial or quasi-judicial duty, the only question that can arise is: Did he genuinely consider the report of the person by whom the public local inquiry is held? Of course, it is extremely difficult, to say the least, to prove that he did not genuinely consider the report. So that for all practical purposes the *Franklin* decision gives the Minister a free hand so far as the report is concerned.

One further point about the public local inquiry. As already mentioned, if any objection is duly made to the proposed order and is not withdrawn, the Minister must, before making the order, cause a public inquiry to be held with respect thereto. The words 'with respect thereto', it has been judicially decided,²⁸ mean 'with respect to the objections'. This has the important

²⁴ [1948] 1 All E.R. 13, at p. 15.

²⁵ *Ibid.*

²⁶ [1947] 2 All E.R. 289.

²⁷ [1947] 2 All E.R. 289, at p. 295.

²⁸ In both the High Court and the Court of Appeal in the *Franklin Case*.

consequence that the Minister is under no duty to call evidence before the public local inquiry, but that the objectors are under a duty to state their objections and call such evidence as they might be advised. Lord Thankerton stated that 'the object of the inquiry is further to inform the mind of the Minister, and not to consider any issue between the Minister and the objectors. That is for the Minister thereafter to consider and decide',²⁹ a view with which the other four Law Lords³⁰ concurred.

It appears from the final paragraph of the judgment of Morris, J., in the *Rollo Case*, that the objectors also contended that the Minister did not give fair and proper consideration to the draft order and to the objections of the objectors. But they could not pursue this contention because of the decision of the Court of Appeal in *Robinson v. Minister of Town and Country Planning*.³¹ That case centred round an order made by the Minister³² declaring that land in an area of extensive war damage should be subject to compulsory purchase for dealing with war damage. The appellant contended that the statutory power given to the Minister to make an order, where he 'is satisfied that it is requisite' that war damaged land should be laid out afresh and redeveloped, declaring such land to be subject to compulsory purchase, meant that the Minister can only be 'satisfied' if, at the time of the order, he has before him evidence sufficient in law to entitle him to be so 'satisfied'. Lord Greene, M.R., rejected this contention, stating that the question is one of opinion and policy, 'matters which are peculiarly for the Minister himself to decide. No objective test is possible'.³³ '... the proposition is, in general, true', continued Lord Greene,³⁴ 'that a Minister cannot be compelled to disclose to the court material which has come to him in his executive capacity. If this were not so, consequences most detrimental to the public interest would ensue as was pointed out by Lord Shaw in *Local Government Board v. Arlidge*'.³⁵ 'How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment, and acts bona fide (as he

²⁹ [1947] 2 All E.R. 289, at p. 297.

³⁰ Lords Porter, Uthwatt, du Parcq, and Normand.

³¹ [1947] 1 All E.R. 851.

³² Under the Town and Country Planning Act, 1944, s. 1 (1).

³³ [1947] 1 All E.R. 851, at p. 857.

³⁴ *Ibid.*, at p. 858.

³⁵ [1915] A.C. 120, at p. 137.

must be assumed to do in the absence of evidence to the contrary), be called on to justify his decision by proving that he had before him materials sufficient to support it?' ³⁶ Somervell, L.J., said: 'No doubt, Parliament always intends that a Minister should act reasonably, but this is a matter on which opinions may differ, and the question is whether it is for the Minister or the courts to impose the standard'. ³⁷

The interpretation of statutes is a matter for His Majesty's judges, not His Majesty's ministers. If Parliament, when conferring a power on a Minister, states that the Minister must, before exercising the power, be 'satisfied' that it is, *e.g.*, in the public interest that he should exercise the power, Parliament has put a check on the Minister. If Parliament had intended that the Minister, when exercising his powers under, *e.g.*, section 1 of the New Towns Act, 1946, should not be amenable to the jurisdiction of the courts, it could easily have followed its own wording in section 3 ³⁸ of the Parliament Act, 1911, and have inserted in the New Towns Act a provision to the effect that any certificate of the Minister stating that he is satisfied shall be conclusive for all purposes, and shall not be questioned in any court of law. As Parliament did not do that, it should have been presumed that Parliament meant the Minister to be controlled in the exercise of his power. In the *Phoenix Case* ³⁹ Henn Collins, J., said it seemed 'little to the point to say that a responsible Minister will not act or form an opinion on insufficient grounds, for it is clear to me on the evidence adduced on one side or the other on the motion that he has done so in this case'. ⁴⁰ The learned judge took the view that he was entitled to inquire into the sufficiency of the grounds, but his view, as has already been seen, was dissented from by the Court of Appeal in the *Robinson Case*. ⁴¹

It is interesting to note that in *Ali v. Jayaratne*, ⁴² the Judicial Committee of the Privy Council construed the words 'where the

³⁶ [1947] 1 All E.R. 851, at p. 859.

³⁷ *Ibid.*, at p. 863.

³⁸ 'Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law'.

³⁹ *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning* [1947] 1 All E.R. 454.

⁴⁰ [1947] 1 All E.R. 454, at p. 457.

⁴¹ [1947] 1 All E.R. 851, in particular the view of Somervell, L.J., at p. 863.

⁴² [1951] A.C. 66; (1950) 66 T.L.R. 214.

Controller has reasonable grounds to believe' (appearing in Defence Regulations operating in Ceylon), as imposing a condition that there must, in fact, exist such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation of a licence. This construction is the very opposite of that adopted by the House of Lords in *Liversidge v. Anderson*,⁴³ where their lordships held that the words 'If the Secretary of State has reasonable cause to believe . . .', in Defence Regulation 18B which operated in this country, meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing.

The English courts have, in disputes arising out of social legislation, formulated what I term the doctrine of judicial leniency, with the result that, for all practical purposes, the Minister can, or cannot, as he pleases, make an order designating an area as the site of a proposed new town.⁴⁴ If he does make such an order, and provided the validity of the order is not successfully challenged in the High Court within six weeks of the publication in the *London Gazette* of the notice of the making of the order, although the order comes into operation on such publication of the notice, then steps must be taken for the creation and development of the new town. This naturally leads to a consideration of the establishment and general powers of development corporations.

DEVELOPMENT CORPORATIONS

The Minister must, by order, establish a development corporation consisting of not more than nine persons, such corporation being a body corporate by such name as may be prescribed by the Minister's order, with perpetual succession, a common seal, and power to hold land without licence in mortmain.⁴⁵ Such development corporations have already been established for the new towns of, *e.g.*, Aycliffe, Crawley, Harlow, Hemel Hempstead, and Stevenage.

⁴³ [1942] A.C. 206.

⁴⁴ Designation orders made under section 1 of the New Towns Act, 1946, should be registered in the appropriate Local Land Charges Registers. See the New Towns Act, 1946 (Register of Orders) Rules, 1946—S.R. & O. 1946, No. 1896/L. 23. No. 3 of these rules creates a new part of the Register of Local Land Charges, *viz.*, Part 7, to comprise entries of designation orders and compulsory purchase orders made under the Act.

⁴⁵ New Towns Act, 1946, s. 2 (1).

The objects of a development corporation are to secure the laying out and development of the new towns in accordance with proposals submitted to, and approved by, the Minister.⁴⁶ The Minister, before approving the corporation's proposals, with or without modifications, must consult the local planning authority within whose district the land is situated, and any other local authority who appear to him to be concerned.⁴⁷ That is, the Minister may consult any local authority, whether or not any part of the new town is within the area of the local authority.

Obviously, the development corporations must be given adequate power to carry out their objects, and they have been given power to acquire, hold, manage and dispose of land and other property, to carry out building and other operations, to provide water, electricity, gas, sewerage and other services, to carry on any business or undertaking in, or for the purpose of, the new town, and generally to do anything necessary or expedient for the purposes of the new town, or for purposes incidental thereto,⁴⁸ but they have no power to borrow money.⁴⁹ The Minister is entitled to give directions to a development corporation for restricting the exercise by it of any of its statutory powers, or for requiring it to exercise its powers in any manner specified in the Minister's directions.⁵⁰ It is true that the Minister, before giving any such directions, must consult with the chairman of the corporation, unless he is satisfied that, on account of urgency, such consultation is impracticable,⁵¹ but this requirement could have no real value.

The powers of a development corporation relate only to its capacity as a statutory corporation, and it is expressly provided that the corporation is not authorised (1) to disregard any enactment or rule of law,⁵² or (2) to carry on any undertaking for the supply of water, electricity or gas, or any railway, tramway or trolley vehicle undertaking, without specific statutory authority.⁵³ It is further expressly provided that any contract or instrument which, if made or executed by a person not being a body cor-

⁴⁶ New Towns Act, 1946, ss. 2 (2), and 3 (1).

⁴⁷ *Ibid.*, s. 3 (1).

⁴⁸ *Ibid.*, s. 2 (2).

⁴⁹ *Ibid.*, proviso to s. 2 (2).

⁵⁰ *Ibid.*, s. 2 (3).

⁵¹ *Ibid.*, proviso (a) to s. 2 (3).

⁵² *Ibid.*, s. 2 (4).

⁵³ s. 21 (1).

porate, would not be required to be under seal, may be made or executed on behalf of the corporation by any person generally or specially authorised by it to act for that purpose.⁵⁴

That it is the intention that the freehold in land, acquired by development corporations whether voluntarily or compulsorily,⁵⁵ shall remain in public ownership until the Minister thinks it should once again be capable of private ownership, is clearly evidenced by the statutory provision that a development corporation has no power, except with the Minister's consent, to transfer the freehold in any land, or, moreover, to grant a lease for more than ninety-nine years. The Act further stipulates that the Minister is not to consent to any such disposal of land unless he is satisfied that there are exceptional circumstances which render such disposal expedient.⁵⁶ Apart from this prohibition, and subject to any directions given by the Minister, a development corporation is entitled to dispose of any land it has acquired to such persons, in such manner, and subject to such covenants or conditions, as it considers expedient for securing the development of the new town in accordance with its proposals approved by the Minister.⁵⁷

The corporation is directed by the Act that it must exercise its powers so as to secure, so far as practicable, that persons who were living or carrying on business or other activities on the land shall have, if they desire to obtain accommodation on the corporation's land, and are willing to comply with any requirements of the corporation as to the development and use of the land, an opportunity to obtain accommodation suitable to their reasonable requirements on terms settled with due regard to the price at

⁵⁴ *Ibid.*, Second Schedule, para. 11.

⁵⁵ A development corporation has power, with the Minister's consent, to acquire by agreement (*i.e.*, voluntarily), or it may be authorised by means of a compulsory purchase order made by itself and submitted to and confirmed by the Minister to acquire compulsorily:

- (1) any land within the area designated under the Act as the site of the new town;
- (2) any land adjacent to that area which they require for purposes connected with the development of the new town;
- (3) any land, whether adjacent to that area or not, which they require for the provision of services for the purposes of the new town; s. 4 (1).

Compulsory purchase orders made under s. 4 should be registered in the appropriate Local Land Charges Registers. See the New Towns Act, 1946 (Register of Orders) Rules, 1946—S.R. & O. 1946, No. 1896/L. 23.

⁵⁶ Proviso to s. 5 (1).

⁵⁷ s. 5 (1).

which the land was acquired from those persons.⁵⁸ That provision looks very nice, but one should bear in mind that it is the Minister who is the final arbiter. It should be mentioned, however, that there is a statutory provision that if the development of the site of a new town will involve the displacement of persons already residing in premises on such land, the corporation must provide, in advance of the displacement, residential accommodation for such persons.⁵⁹ The corporation has power to pay any such displaced person such reasonable allowance, as it thinks fit, towards his removal expenses, and towards the loss which, in its opinion, such person will sustain by reason of the disturbance to his business consequent on his having to quit the premises.⁶⁰

The Minister has power to extinguish, by means of a ministerial order,⁶¹ public rights of way over land acquired for the purposes of a new town, while private rights of way over land compulsorily acquired are automatically extinguished on the completion of the purchase, but compensation is payable.⁶²

It may be of interest to state that the Licensing Act, 1949, extends to all new towns established under the New Towns Act, 1946, the State management of the liquor trade, already in operation in Carlisle, Gretna, and Cromarty Firth districts. There is a State Management District Council which advises on the activities of the licensed trade in those districts where the liquor trade is State managed, and the Minister has recently appointed representatives of the new towns on such council.

Let no one who is living in premises protected by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and whose premises are acquired by a development corporation, think that he cannot be turned out unless the courts think he ought to be. What is a fair imposition on a private landlord becomes unfair for a public landlord! The Act provides that if the Minister certifies that possession of any such premises is immediately required for the purposes for which the development corporation acquired it, then nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, is to be deemed to prevent the

⁵⁸ s. 5 (2).

⁵⁹ s. 6 (1), and the Town and Country Planning Act, 1944, s. 30.

⁶⁰ s. 6 (1), and the Town and Country Planning Act, 1944, s. 30 (5).

⁶¹ This power enables the Minister to avoid the cumbersome procedure for closing public highways laid down by the Highways Act, 1835.

⁶² s. 6 (1), and the Town and Country Planning Act, 1944, ss. 23-25.

corporation from obtaining possession of the house.⁶³ Furthermore, if possession of premises is required by the corporation, then, whatever may be the value or rent of the premises, the corporation can obtain possession of the premises under the Small Tenements Recovery Act, 1838, at any time after the tenancy of the occupier has expired or been determined.⁶⁴

A final word concerning acquisition of land by a development corporation. When the Minister makes a designation order, the corporation has seven years from the date on which such order became operative to acquire the land. If it does not do so, then the owner of the land is entitled to give written notice to the corporation requiring it to purchase his interest, whereupon the corporation is deemed to have been authorised to acquire the interest compulsorily, and to have served notice to treat in respect thereof on the date on which the owner served his notice.⁶⁵

No doubt to ensure uniformity of practice by development corporations when exercising their powers, the Minister has made the New Towns (Particulars and Forms of Orders and Notices) Regulations, 1947,⁶⁶ No. 6 of which regulations provides that the forms (which include Forms of Compulsory Purchase Order) or forms substantially to the like effect, are to be the forms used in connection with the powers and duties of development corporations under the Act, in all cases to which those forms are applicable. These regulations give an indication of the personal interest the Minister has in one's affairs. Number 4 of them provides that any notice or other document to be served on an owner or occupier shall, at the beginning of such notice or document, have clearly and legibly inscribed upon it in the following form the words: '*IMPORTANT. This communication affects YOUR PROPERTY*', and if the notice or document is not sent

⁶³ s. 6 (1), and the Town and Country Planning Act, 1944, s. 30 (3).

⁶⁴ s. 6 (1), and the Town and Country Planning Act, 1944, s. 30 (4). The Small Tenements Recovery Act, 1838, only applies to a house, land or other corporeal hereditament which has been held on a tenancy-at-will or for a term not exceeding seven years, either rent free or at a rent not exceeding £20 a year, and upon which no fine has been made payable, and the term has ended or has been duly determined by a legal notice to quit or otherwise. If the tenant or occupier of such premises neglects or refuses to give up possession, the landlord can recover possession summarily before the justices.

⁶⁵ s. 6 (4).

⁶⁶ S.R. & O. 1947, No. 1354.

by registered post the envelope must be endorsed in like manner. It was most kind of the Minister to order that this should be done. Recipients, it is to be hoped, will respond in the right way and read the notices and documents sent to them in this manner!

It has already been pointed out that the objects of a development corporation are to lay out and develop a new town. The day will arrive when it will have achieved those objects, and then its continued existence will no longer be necessary or desirable. The Act accordingly provides that when the Minister is satisfied that the purposes for which a development corporation was established have been substantially achieved, and is further satisfied, with the concurrence of the Treasury, that the circumstances are not such as to render it expedient on financial grounds to defer the disposal of the undertaking of the corporation, he must by order provide for the winding-up and dissolution of the corporation.⁶⁷

At any time after making such an order, the Minister may, with the consent of the Treasury, make another order providing for the transfer of the undertaking (or any part of it) of the corporation to a local authority within whose area the new town is situated.⁶⁸ This second order cannot be made before the Minister has consulted the county council and county district council in which the new town is situated; with any other local authority; and with certain statutory undertakers; and the order will be of no effect until a third order defining the terms on which the transfer is to be made has become operative.⁶⁹ If the Minister is satisfied that it is expedient, having regard to the terms upon which the transfer is to be made, that the corporation's liability in respect of advances made to it under the Act should be reduced, he has power to make a fourth order, with the consent of the Treasury, reducing that liability to the extent specified in the order,⁷⁰ but this fourth order will be of no effect until it is approved by resolution of the House of Commons.⁷¹ The hopes and fears of the taxpayer are not forgotten. Any surplus arising from the winding-up of a development corporation must be paid into the Exchequer, and any deficit must be defrayed out of moneys provided by Parliament.⁷²

⁶⁷ s. 15 (1).

⁶⁸ s. 15 (2).

⁶⁹ Proviso to s. 15 (2).

⁷⁰ s. 15 (4).

⁷¹ Proviso to s. 15 (4).

⁷² s. 15 (7).

CONCLUSIONS

It is clear from the statutory provisions considered above that the Minister has, for all practical purposes, unfettered control over the designation of the site for, and development of, the new town. He selects and designates the site, and appoints the members of the development corporation. It is true that before making such appointments he has to consult with such local authorities as appear to him to be concerned with the development of the new town, and that he must have regard to the desirability of securing the services of one or more persons resident in, or having special knowledge of, the locality in which the new town will be situated.⁷³ This is not a real restriction on his powers. The Minister has power to remove a member of a development corporation from his office, *i.e.*, to sack him, if the Minister is satisfied that such member is unable or unfit to discharge the functions of a member, or is unsuitable to continue as a member.⁷⁴ The existence of this power of dismissal could easily result in the members of a development corporation not being of the right type from the point of view of the community.

The Minister has power to give directions to the development corporation to submit proposals to him for the development of the new town, and to grant permission for any development of the land, in accordance with the proposals he has approved, by embodying them in a special development order,⁷⁵ thus avoiding the necessity of the corporation having to obtain planning permission from the local planning authority,⁷⁶ unless he so directs in the special development order. He has power to restrict the exercise by the development corporation of any of its statutory powers, and to specify the manner in which the corporation shall exercise its powers. He has power to extinguish public rights of way. He has power to deprive an occupier of the protection given by the Rent Restrictions Acts.

These are the powers to which reference is made above, but he has other powers under the Act. For example, he has power to make advances to development corporations not exceeding in the aggregate £50,000,000.

The conferment of such wide powers, unaccompanied by the

⁷³ Second Schedule, para. 1.

⁷⁴ *Ibid.*, para. 5 (d).

⁷⁵ Made under the Town and Country Planning Act, 1947, s. 13.

⁷⁶ *Ibid.*

imposition of any real safeguards, gives rise to many problems, but it is only possible to indicate in this paper three of the major problems.

FIRST PROBLEM: INADEQUATE PARLIAMENTARY CONTROL

The first is the shift in the locus of sovereignty caused by these extremely wide ministerial powers. No one can deny that, for the last fifty years or so, real sovereignty has been passing from Parliament to the Executive, and the New Towns Act, 1946, illustrates the point. The reports of the Aycliffe, Crawley, Harlow, Hemel Hempstead, and Stevenage Development Corporations for the period ending March 31, 1948,⁷⁷ give figures for population, and they can be tabulated as follows:—

<i>New Town</i>	<i>Approximate population at March, 1948</i>		<i>Proposed population of new town</i>
Aycliffe (Durham)	...	60	10,000
Crawley (Sussex)	...	8,000	50,000
Harlow (Essex)	...	4,500	60,000
Hemel Hempstead (Herts) ...	21,000		60,000
Stevenage (Herts)	...	7,000	60,000
		Total 40,560	240,000

The approximate average increase in population, on these figures, will be 40,000, and the Minister and the development corporations are planning the lives of 240,000 persons in these five new towns alone. The Minister is, in a sense, elected by the people, but, for all practical purposes, he is not controlled either

⁷⁷ These are the first Annual Reports of these Development Corporations. Under s. 13 (6), every Development Corporation must, as soon as possible after the end of each financial year, make a report to the Minister dealing generally with the operations of the corporation during that year, and the Minister must lay a copy of every such report before each House of Parliament. At the time of preparing this paper (November 18, 1950) the second Annual Reports were not available to the general public, but they have since been published. It appears from the Third Annual Report of the Aycliffe Development Corporation that it is now suggested that the population of the new town of Aycliffe should be 23,000. The Third Annual Report of the Harlow Development Corporation contains some pungent comments on the multiplication of controls on Development Corporations, '... they create machinery which is in some respects cumbrous almost past belief and which produces in profusion officials doing, one after another, work that one official could well have been trusted to do by himself. Development Corporations have too many masters'.

by Parliament or the courts. Development corporations are not elected bodies, they are nominated and controlled by the Minister. Surely in such an important matter it is for Parliament itself to decide where new towns should be established and developed, not for a single person in the shape of a Minister to make such a decision. To date there are fourteen new town corporations, twelve in England and Wales, and two in Scotland.

Of course, the increased range of activities of the State must result in some change of *de facto* sovereignty, but Parliament should not be so eager to assist and help in bringing about a complete change. The fundamental law in the British constitution, that Parliament is supreme, has become a danger, as it enables the Executive to use the legal sovereignty of Parliament to give itself *de facto* sovereignty. The designation of new towns, having regard to the wide managerial powers conferred by the Act, should have been regarded as a matter to be settled by Parliament. One is appalled by the possibilities of the present situation. The Executive has power to acquire ownership and possession of a citizen's house; it can, by exercising its powers of economic control, so locate industry as to make it extremely difficult for that citizen to earn his livelihood in a place of his own choosing; should he overcome that difficulty, and the Executive thinks he ought not to have done so, then it can exercise its present power to direct him to follow an occupation chosen by it, in a place chosen by it. Even then he may not be able to earn his living unless he becomes a member of the appropriate trade union. One problem, therefore, is how to restore proper and adequate parliamentary control of the Executive. Some aspects of this problem I have dealt with at greater length elsewhere.⁷⁸

SECOND PROBLEM: POSSIBLE ABUSE OF MANAGERIAL POWERS

A second problem is how to ensure that the managerial powers conferred by the Act are not abused. It is conceded that parliamentary control is not, in this respect, a suitable kind of control. What about the ordinary courts of law? They, on their own showing, clearly do not want the job. But should the 'man in

⁷⁸ See 'Bentham and Parliamentary Reform', *Jeremy Bentham and the Law* (1948), pp. 123-151, and 'The House of Lords and its Reform', *Current Legal Problems* (1948), Vol. 1, pp. 69-88.

the street' be left to fight a lone battle with the Minister and/or the development corporation?

The conferment itself of these wide managerial powers can be dangerous, but the exercise of such powers is even more dangerous, as it could enable the Minister to bring about changes in the national social life that he himself considers desirable. All of us are aware of the ever-growing influence of the State on human lives and happiness, and the powers of the Minister under the New Towns Act, 1946, do provide a temptation to the executive to teach its own philosophy. For example, Mr. Bevan, when Minister of Health, stated that it is essential in the welfare State that the fellows with the rolled-up umbrellas should live in the same places as the chaps wearing caps. He did not explain to what it is essential, but his views correspond with what appears to be a fairly widespread assumption concerning the class-structure of a neighbourhood unit. As is stated in a recent article,⁷⁹ this planning conception comprises 'to a large extent, a separate self-contained unit of population, with its own services and facilities, and having, ideally, the minimum of external social and recreational relations. Its facilities should be diverse to cater for varied tastes, and the whole should be an integrated and well-balanced entity. Following from this is the assumption, indeed the condition, that the population must include groups from all the social classes to be found in society'.

Mr. Campleman then goes on to point out that the primary justification for this concept of the neighbourhood unit is that it will foster 'a "communal consciousness" and the spirit of "neighbourliness" essential to the full and satisfying life. This neighbourliness, the sense of togetherness with the other members of the group, is derived from a consciousness of participating in the affairs of, and having an individual relationship to, the rest of the group. That this sociability evolves in a communal group over time is a matter of observation, but it is essential to its full development that the fundamental factor of common interest should exist'.⁸⁰ The evidence of the sociological surveys of Middlesbrough and of other places 'confirm the belief that towns are essentially cellular structures, both physically and socially.

⁷⁹ Gordon Campleman, 'Mixed-Class Neighbourhoods: Some Sociological Aspects', *Town and Country Planning*, August 1950, p. 330.

⁸⁰ *Loc. cit.*

The larger whole is composed of a number of clearly defined parts. All this warrants the practice of planning new urban areas in terms of neighbourhood units. . . . But it is unlikely, indeed highly undesired, that neighbourhoods should be totally self-contained. . . .⁸¹ After pointing out that it is highly improbable that the different classes would use the same social institutions, and that all that would be achieved by 'social mixing' is the present pattern of social and geographic differentiation on a smaller scale, Mr. Campleman states: 'It would, therefore, appear to be better, so far as class differences remain, to plan reasonably small one-class neighbourhoods, and to accentuate their common problems and interest at the level of town affairs. They should be planned as inter-dependent cells, and their boundaries should never be allowed to become obstacles to movement or social intercourse'.⁸²

It is interesting to note that the Bournville Estate, which has an international reputation for being a successful example of planned social mixing, conforms to the structure advocated by Mr. Campleman.⁸³ Notwithstanding the adequate interest and social co-operation of the inhabitants of that estate, spontaneous neighbourhood groupings of the kind just described have emerged, 'the Weoley Hill neighbourhood containing a very large proportion of professional people, doctors, teachers, university staffs, etc. The important fact is that these different neighbourhoods are inter-dependent and essential parts of the larger whole, the Bournville Trust Estate'.⁸⁴

It is obvious from these observations that there could be a genuine conflict of opinion as to the basis of the development of new towns. Further, in a letter written by a county planning officer, published in the *Glasgow Herald* of February 7, 1950, it is stated that 'some members of the planning profession are worried about the new towns. This is especially so in the case of the new towns planned around London, which, from the distance of Scotland, would simply appear to be spreading the "sprawl" of London farther, in a slightly more scientific manner. A real redistribution of population over the whole country is essential, but this will never be met by the present new

⁸¹ *Ibid.*, p. 331.

⁸² *Ibid.*, p. 332.

⁸³ *Loc. cit.*

⁸⁴ *Loc. cit.*

town policy'.⁸⁵ A genuine difference of opinion obviously being possible, should the Minister alone, in terms of law, be entitled to make the final decision? The Minister, no doubt, sincerely believes that what he wants is in the best interests of the community as a whole. The planners assisting him in carrying out his ministerial duties may, equally, be imbued with the same spirit. But, as Lord Justice Denning has written '... an official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant'.⁸⁶

The Committee on Ministers' Powers, too, pointed out in 1932 that '... the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds, is more subtle and less easy for him to detect and resist'.⁸⁷ And, some eight years previous to the publication of the report of the Committee on Ministers' Powers, Scrutton, L.J., had said: 'Good faith is not, in my view, sufficient by itself; some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, but yet quite beyond the limit of reasonableness'.⁸⁸

Personally, I prefer this view to that recently expressed by Birkett, J., as he then was, in *Earl Fitzwilliam's Wentworth Estates v. Minister of Town and Country Planning and Another*,⁸⁹ to the effect that, provided the Central Land Board possessed the power to make the order they did make, 'the precise motives with which they exercised it would not be material, and would not be a matter for the court to inquire into, the good faith of the Board and the Minister not being in question'. The precise motives are very material, and when any person or body is invested with powers the exercise of which affects the general public, then such person or body ought to be under a legal duty to disclose his or its precise motives for exercising the powers.

⁸⁵ The letter is reprinted in the *Journal of the Royal Society of Arts* (1950), Vol. 98, pp. 306-307, at the end of the paper entitled 'Are Town-Planners planning too far ahead?', read to the Society by E. Munro Runtz.

⁸⁶ *Freedom under the Law* (1950), p. 100.

⁸⁷ (1932), Cmd. 4060, p. 78.

⁸⁸ *R. v. Roberts, Ex p. Scutt and Others* [1924] 2 K.B. 695, at p. 710.

⁸⁹ [1950] 2 All E.R. 765, at p. 778.

As an eminent town planner has stated, ' . . . we can all think of model lay-outs in which so much has been done by the designer that the inhabitants have no initiative left to make a life for themselves'.⁹⁰ I regard such a designer as having gone beyond the limits of reasonableness, and as being a person for whom good faith and sincerity should not be a successful defence to a charge of abuse of power.

I think it is true to say, as the Committee on Qualifications of Planners has recently said, ' . . . the country has accepted the idea that there must be effective powers to regulate the use and development of land in such a way as to take account of social, economic and strategic objectives, and to ensure that conflicting demands are reconciled in the best way possible in the national interest'.⁹¹ I feel sure, however, that the country does not realise the extent to which, so far as the establishment and development of new towns are concerned, the country is in the hands of the Minister.

During 1949, a note on planning legislation was published in the *Economist*, entitled ' Back to Titus Oates ', in which it was stated that if we cannot go back to Magna Carta we can at least reassert some of the essential principles. One of these essential principles, the author wrote, is that acts of Government are not *ipso facto* to be deemed to be in the public interest, and another, that no man, even if he be a town planner, ought to be judge in his own case. ' We are far gone ', the writer added, ' in a peculiarly vicious form of *droit administratif*, and it is time to rebel against it '. My own view, which I have put forward at greater length elsewhere,⁹² is that a Supreme Court of Administration should be established, having power (1) to inquire into the motives for an administrative decision; (2) to annul an executory administrative decision; and (3) to award damages for loss suffered as the result of a wrongful act committed by an agent of a public service in the exercise of his administrative functions.

THIRD PROBLEM : EDUCATION FOR PLANNERS

Another problem is the right kind of education for planners. As

⁹⁰ Professor W. G. Holford, *Civic Design. An Inquiry into the scope and nature of town planning* (1948), p. 5.

⁹¹ *Report of the Committee on Qualifications of Planners* (1950), Cmd. 8059, para. 49.

⁹² See 'Safeguards in the Exercise of Functions by Administrative Bodies' (1950), 28 *Canadian Bar Review*, pp. 538-563.

the Committee on Qualification of Planners have stated, the New Towns Act, 1946 (and the Town and Country Planning Act, 1947), marks the beginning of a new stage in the adoption of a positive conception of planning which intimately affects the lives of us all. 'The mere existence of the new powers is of vital significance, and in the long run the manner of their use, abuse or neglect will profoundly influence the nation's future. Therefore . . . the new powers must be balanced by worthy qualifications'.⁹³ Space does not permit of my dealing with this problem, which is fully considered in the report of the Committee on Qualifications of Planners. Suffice it to say, as Professor Holford has pointed out, that the general cultural importance of town planning must have 'a considerable bearing on the outlook and training required by the town planners themselves. It seems that town planning is a product of a rather delicate relationship, that of administration to design, and its purpose is to demonstrate a way of living. This does not mean only a high standard of design in material things; it means improved social relationships, an awareness of things seen, all the amenities of self-government, of order, of diversity within a containing pattern'⁹⁴ ' . . . we want people [as planners] with a broad cultural background, able to understand the point of view of scientist and humanist, and interested in society at all levels'.⁹⁵

In conclusion, I would like to refer to the views of an eminent judge, of two eminent town planners, and of an eminent educationist.

In *Roberts v. Hopwood*,⁹⁶ Lord Sumner said: ' . . . persons who hold public office have a legal responsibility towards those whom they represent—not merely towards those who vote for them—to the discharge of which they must honestly apply their minds. Bona fide here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and, therefore, not contrary to law. It must mean that they are giving their minds to the comprehension, and their wills to the discharge, of their duty towards that public, whose money and local business they administer'. In the light of judicial interpretation of modern

⁹³ (1950), Cmd. 8059, para. 149.

⁹⁴ *Civic Design*, p. 13.

⁹⁵ *Ibid.*, p. 16.

⁹⁶ [1925] A.C. 578, at p. 603.

planning legislation, the opening words of this quotation—to make them applicable to the present position of the Minister—would have to be altered to read ‘ . . . persons who hold public office ought always to be under a legal responsibility ’.

In the *Journal of the Town Planning Institute*,⁹⁷ Mr. Pepler wrote in 1949: ‘ One lesson above all that I have learned and relearned during the past year, is the extent to which statutory provisions, such as the new planning law, depend for their success on the force of public opinion behind them. Experts can make plans and dictators enforce them but . . . in the long run the only planning that will succeed is that which the public wants ’.

In his presidential address to the education section of the British Association,⁹⁸ Mr. W. F. Oakeshott stated that it is not so much in the political sphere as in the administrative sphere that danger signals are to be observed, and asked whether he was right in thinking that the new form that ambition took was ambition for power; ambition to command, ambition to make decisions that would affect ten millions of people; ambition to carry out a vast plan because it was a vast plan, not because it was a good plan. He thought the problem of technical power appears to be bound up with two educational necessities—the need for educating the non-scientist in the ways of the scientist, and the need for creating in the scientist some idea of the social implication of his technique.

Finally, in his *Civic Design*, Professor Holford has written: ‘ The great advance that town planning will have to make in the coming century will emerge from the struggle between the diversity that goes with culture, and the uniformity that so easily becomes associated with democracy and a planned economy ’.⁹⁹

It is submitted that these views embody sound common sense, and that they should never be lost sight of, either by the Minister or by town planners. They contain valuable lessons for the Minister and his associates.

⁹⁷ (1949), Vol. 35, p. 232.

⁹⁸ Delivered at Birmingham on September 1, 1950.

⁹⁹ *Civic Design*, p. 14. Professor Holford was using the expression ‘ town planning ’ to embrace all kinds of development, whether urban or rural: see *Civic Design*, p. 1. His views, obviously, are of importance in connection with ‘ new town ’ planning.

PUBLIC LAW PROBLEMS IN RECENT ENGLISH DECISIONS

W. FRIEDMANN

THE PLACE OF PUBLIC LAW IN THE CONTEMPORARY ENGLISH LEGAL SYSTEM

IT is no longer necessary to argue whether public law has a place in the English legal system. Public law confronts us with increasing frequency and urgency. What we do have to study is the precise scope and function of public law, and its relation to the common law tradition. Dicey's influence retarded the systematic and theoretical study of public law until the flood of new social services, ministerial powers, administrative tribunals and public corporations injected public law problems into English law far in advance of its theoretical study. It is apparent that all these new institutions and relations cannot simply be treated within the legal categories and relations of private law. They demand a new analysis of many different types of legal relations between public authority and the citizen. How far these developments take place inside or outside the common law is still rather obscure.

Public law, as first developed in France during the nineteenth century, means an attempt to restrict the unfettered discretion of public authorities, by legal rules enforceable before courts which recognise the needs and characteristics of administration, but impose certain clearly defined limits upon administrative discretion. Here, as in so many other fields, the much-vaunted differences between Continental and Anglo-American legal thinking are less important than the legal problems posed, in both systems, by different types of society. In a Communist or Fascist Britain, Germany, France, or Russia, the distinction between public and private law becomes relatively unimportant. But a democratic France and a democratic Britain are confronted with basically similar problems, of how to blend the expanding administrative tasks of the social welfare

State with the protection of individual rights and the legal prevention of abuse of power.

This does not mean that the technical ways in which the different democratic legal systems attempt to solve this problem are identical. Rather too much attention has been paid in recent years to the problem of administrative tribunals. English jurists have found that the multitude of *ad hoc* administrative tribunals, set up during the last few decades, prevents a systematic development of public law, and facilitates the abuse of public power. There has been much argument on the way in which a kind of administrative justice could be developed within the English legal system.

The main advantage of a comprehensive administrative jurisdiction in Continental legal systems has been the stimulus which this has given to constant thinking on public law problems, and, in particular, on the borderline between public and private law. The first problem which every administrative tribunal faces is that of jurisdiction. Whether a particular dispute is to be decided by a civil or an administrative court depends mainly, though not entirely, on the allocation of the subject matter to public law or private law. This has meant, for example, the juridical development of the dual capacity of the State as sovereign and *fiscus*, as a subject of public and private law relations. It has also compelled the analysis of legal transactions for the purpose of allocating them to one or the other sphere. As has been shown elsewhere,¹ the solutions are far from being unanimous or definite. But the problem can be dealt with more clearly and systematically in Continental legal systems than in English law.

In English law it would be misleading to look for the main problems of public law in the largely unpublished decisions of administrative tribunals, or even in the prerogative jurisdiction of *mandamus*, *certiorari* and *prohibition*, exercised by the King's Bench Division. Many of the most important public law problems appear in ordinary common law actions, such as an action for nuisance against a public hospital, or for a declaratory judgment against a public corporation, or for breach of contract against a government department. Such problems also frequently

¹ See Friedmann, 'Public Welfare Offences, Statutory Duties and the Legal Status of the Crown' (1950), 13 *Modern Law Review*, pp. 32-35.

arise where 'statutory authority' is pleaded as a defence by Crown departments or public corporations. Indeed it may be said that the more fundamental public law problems appear more often in a King's Bench or Chancery judgment than in the award of a compensation or pensions tribunal. They are, however, so scattered and often so disguised that their true significance in the changing pattern of British society has hardly been noticed.

SURVEY OF PUBLIC LAW PROBLEMS IN RECENT ENGLISH DECISIONS

It is difficult to systematise the public law problems which have occupied both the legislature and the courts in recent years. It may be convenient to consider them according to three broad, though closely inter-connected, problems:

1. The conflict of public interest and private rights.
2. The borderlines between administrative discretion and legal duties.
3. The problems of sovereignty and equality in the legal relations between the State and other public authorities on the one side, and the individual citizen on the other.

These problems are inter-connected because the prevalence of public interest as against private rights usually goes hand in hand with the scope of administrative discretion, and the allocation of a particular State activity falls within its sovereign rather than its non-sovereign sphere. Nevertheless, emphasis on these three aspects will help to clarify the problems.

THE CONFLICT OF PUBLIC INTEREST AND PRIVATE RIGHTS

The adjustment between public interest and private rights can be most clearly followed in the judicial interpretation of statutes. There are no constitutional guarantees of personal liberty in British law. Its main protection lies in the strength of public opinion, and in the determination of an independent judiciary to protect the basic liberties, unless they are directly and clearly restricted by legislation. Yet the courts are sometimes prepared to sacrifice the protection of personal liberty for its *raison d'état*. They will do this only in times of war or exceptional political emergency.

The decision in *Liversidge v. Anderson*,² during the last war,

[1942] A.C. 206.

showed the House of Lords clearly prepared to depart from ordinary canons of statutory construction in order to give precedence to the national interest. Regulation 18B of the Defence Regulations, 1939, gave the Home Secretary certain powers of detention where he 'has reasonable cause to believe any person of hostile origin or associations . . .'. In an action for false imprisonment against the Home Secretary, the majority of the House decided that it could make no order for particulars to compel the Secretary of State to prove the facts justifying the order for detention. The majority based their judgments mainly on general policy considerations. They held that a regulation of this kind had to be interpreted with a view to the emergency of which it was a consequence; that compulsion to disclose facts before the court would gravely interfere with public policy and national safety, and that these considerations prevailed over the grammatical formulation and normal rules of interpretation.

Lord Atkin, in his dissenting judgment, had little difficulty in showing that the words 'has reasonable cause to believe' are different from the formula 'thinks that he has reasonable cause to believe'. He produced overwhelming evidence from other statutes and regulations illustrating the difference between objective and subjective interpretation. In the absence of any specific direction to the contrary, Lord Atkin held that the question whether the Home Secretary has 'reasonable cause' was clearly the subject of judicial evidence and decision. Logically, it is submitted, Lord Atkin's argument is unassailable. The difference between him and the majority was not a matter of logic, but of policy. The majority were prepared to ignore ordinary rules of interpretation because they regarded the public interest of national safety in times of war as superior to the normal safeguards for the liberty of an individual.³

The paramouncy of State interests in matters concerning the defence of the realm has a long history, and the courts are reluctant to sacrifice the interests of the individual to those of the State in such situations. Present day social and international developments may make the distinctions between war and peace,

³ Similar considerations moved the House of Lords, in *Duncan v. Cammell Laird and Co.* [1942] A.C. 624, to confirm the privilege of the Crown in regard to discovery of documents, it being urged that the Crown should claim privilege only where required by national security. This rule has now been embodied in the Crown Proceedings Act, 1947, s. 28 (2).

between emergency situations and normal situations, more and more precarious. The Australian Act, outlawing the Communist Party and affiliated organisations, and subjecting persons declared to be Communists to serious disabilities, was based on the defence power of the Commonwealth.⁰ The very term 'cold war' indicates the twilight atmosphere between war and peace, which will make it more difficult for the judiciary to have one approach in times of war, and another in times of peace. But it is still broadly correct to say that English law courts will interpret State powers restricting individual rights far more strictly in times of peace than in times of war.

In *Nakkuda Ali v. Jayaratne*,⁴ the Privy Council was concerned with a regulation providing that 'Where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer. . . .' Except in the substitution of the word 'ground' for 'cause', this was identical with Defence Regulation 18B. The Privy Council expressed its disagreement with *Liversidge v. Anderson* in unmistakable terms, saying⁵: 'It would be a very unfortunate thing if the decision of *Liversidge's Case* (*supra*) came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. . . . After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their lordships therefore treat the words in regulation 62 "where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds, known to the

⁰ The Act was declared unconstitutional by the Australian High Court in March 1951.

⁴ (1950) 66 T.L.R. 214.

⁵ *Ibid.*, p. 216.

controller, before he can validly exercise the power of cancellation'.

Most of the decisions concerned with the adjustment of public interest and private rights have arisen from the extension of social services and public duties, and their corresponding limitation of private rights. Housing legislation provides an illustration of this conflict of interests. Such legislation has deliberately sought to restrict freedom of property and, to some extent, of contract, in order to achieve certain minimum standards of social welfare.

The Housing Act, 1925, in a clause later re-enacted in the Housing Act, 1936, imposed on the lessor of houses, below a certain rateable value, a statutory obligation to keep the house 'in all respects reasonably fit for human habitation'. The interpretation of this clause occupied the attention of the Court of Appeal in 1927⁶ and, fifteen years later, the House of Lords.⁷ The defective sashcord in a working class house had caused the window to fall and crush the plaintiff's hand while she was cleaning the window. The Court of Appeal adopted the approach of Salter, J., in a case decided some years earlier, namely, that 'the standard of repair required by those Acts is naturally . . . a humble standard'.⁸ The court held, by a majority, that the breaking of the sashcord did not prevent the house from being in all respects reasonably fit for human habitation, and Lawrence, L.J., even went so far as to describe a different attitude as 'somewhat fantastic'.⁹

Indicative of this 'private rights' approach to a public law statute was the court's treatment of the statutory warranty as contractual, so that damages could not be recovered unless notice, as required by common law, was given by the tenant to the landowner (although the Housing Act did not stipulate any notice and the defect might be hidden).

The decision of the House of Lords—given in the middle of the last war when the people of Britain had transferred to the Government almost unlimited powers over their persons and properties, and when the hope for a better social order inspired the vast majority of Britons to suffer danger and privation—

⁶ *Morgan v. Liverpool Corp.* [1927] 2 K.B. 131.

⁷ *Summers v. Salford Corp.* [1943] A.C. 283.

⁸ *Jones v. Green* [1925] 1 K.B. 659, at p. 668.

⁹ [1927] 2 K.B., at p. 152.

struck a very different note from that of the Court of Appeal fifteen years earlier. The House rejected both the contractual approach, and the somewhat cynical interpretation of what sort of house is fit for the underdog to live in. As Lord Wright put it ¹⁰: 'The provision was to reduce the evils of bad housing accommodation and to protect working people by a compulsory provision, out of which they cannot contract, from accepting improper conditions. Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object. . . . "In all respects" must mean in all respects material to the enjoyment of the tenement, and the unfitness of one room may be a most material detraction from that enjoyment. "Human habitation" is in contrast with habitation by pigs, horses or other animals, or with use as warehouses, and the like, but I think it also imports some reference to what we call humanity or humaneness'. In other words, the statutory obligation is to be interpreted in the spirit of the statute which contains it, namely, as a deliberate measure of restraint on the use of property and the freedom of contract; it is not to be thwarted by conceptions of freedom of contract and property which the statute deliberately sets out to restrain.

A similar problem is shown in another pair of recent decisions. The Paddington Borough Council, following some individual complaints by tenants, had applied to the Rent Tribunal set up under the Furnished Houses (Rent Control) Act, 1946, for the review of rents for an entire block of 555 flats. The tribunal made orders reducing the rents of eight of these flats. The landlords then moved for an order of certiorari, which was granted. Lord Goddard, C.J., delivering the judgment of the divisional court, ¹¹ considered that such block reference to the tribunal was not a bona fide exercise of the powers conferred by Parliament on the local authority. The tribunal was there to deal with individual cases. There was no doubt that under the statute the local authority had power to refer the tenancy contracts to the tribunal, nor had any other section of the Act been infringed. The court, therefore, had to fall back on the mala fides test by giving its own interpretation of the objects of this Act.

¹⁰ [1943] A.C., at p. 293.

¹¹ *R. v. Paddington and St. Marylebone Rent Tribunal* [1949] 1 K.B. 666.

Its underlying attitude was the minimisation of statutory interference with freedom of contract. It is once again a matter of balancing conflicting policies and interests. As the Act was expressed, it was no less legitimate to consider the Rent Tribunal as an institution generally supervising the fairness of rents, on application by one of the interested parties, than it was to make its jurisdiction dependent on a specific complaint by a specific party to the local authority which referred the case to the tribunal. The decision depends on the respective value attributed to the right of the landlord to use his property on his own terms, and the rights of the State to ensure some fairness between the parties, at a time of a general housing shortage.

The public interest again prevailed in a recent decision of the Court of Appeal.¹² Under a now superseded Town and Country Planning Act, the owners of certain land had been given permission for interim development, subject to certain conditions laid down in two agreements between themselves and the local authority. Under these agreements, the parties apportioned the responsibilities and cost of development of the estate, and the plaintiff undertook to dedicate a certain part of the estate to public use. The war halted further development. After the war, the so-called Greater London Plan had included the area in question among those which were not to be developed. Consequently, the Minister, exercising powers conferred by a new Act, withheld permission for further development, although the plaintiffs had already laid out some money in the construction of sewers. They claimed that the defendants had assumed a contractual obligation, by which they had bound themselves not to exercise any existing or future statutory powers in such a way as to restrict the development of the land in accordance with the agreement.

Lord Greene, with whom the other two judges agreed, pointed out that the planning authority could not bargain away its statutory powers of planning conferred on it by an Act in the public interest. 'Is it likely', he said, 'that Parliament, . . . without express words to that effect would do anything so unusual, so explosive, as to enable a planning authority to do that which all the principles laid down and observed by the courts and the legislature in regard to statutory duties of this kind for-

¹² *Ransom & Luck Ltd. v. Surbiton Borough Council* [1949] Ch. 180.

bid, namely, to tie its hands and contract itself out of them?'¹³ He went on to point out that the agreements into which the authority had entered were not contractual, but mainly a manner, permitted by the Act, of carrying out certain statutory duties, and they were subject to the overriding purpose of the statute as a whole.

ADMINISTRATIVE DISCRETION AND LEGAL DUTIES

How to limit administrative discretion so as to maintain a reasonable balance between the needs of administration and the legal security of the individual, may well be described as the cardinal problem of administrative law. The absolute State knows no such limitations except by the grace and concession of the sovereign. The completely liberal State, on the other hand—reflected in Dicey's theory of the rule of law—regards the rules of private law as paramount and binding upon governors and governed alike. But the philosophy and practice of modern democracies, concerned with the balance between the social welfare and individual freedom, must attempt to solve the problem of administrative discretion.

It is at the very heart of the Continental doctrine of administrative law. Slowly, the Continental administrative courts have developed principles by which the State and other public authorities are made accountable for the excess and abuse of administrative powers. In English law the problem is no less important. Owing to the absence of a hierarchy of administrative tribunals, public law problems appear in the most diverse places: sometimes in King's Bench decisions granting or refusing a prerogative order, and sometimes in actions for damages or injunctions against public authorities.

One aspect of the general problem is illustrated by the decisions which have laid down the limits of judicial supervision over the exercise of discretion by a local authority. English courts have given themselves the power to invalidate by-laws of local authorities and other statutory bodies, not only for excess of powers in the strict sense but also for abuse of power, that is, for an exercise of their powers which is 'manifestly unjust, shows bad faith, is oppressive, or a gratuitous interference with the

¹³ [1949] Ch., at p. 195.

rights of those subject to them, as could find no justification in the minds of reasonable men'.¹⁴

In the highly controversial decision of *Roberts v. Hopwood*,¹⁵ the House of Lords, at a time when the English courts often took an unsympathetic attitude towards new social legislation, interpolated the word 'reasonable' in a statute which had given local authorities power to fix wages for their employees 'as they think fit'. The House confirmed the surcharge of the district auditor against the members of a London borough council, which had fixed a uniform minimum wage of £4 a week for all its male and female employees. It rejected the conception of a basic minimum wage for all employees as not being a reward for labour,¹⁶ and also considered the amount fixed as grossly extravagant. In an outburst which, in its betrayal of political prejudice, is very exceptional in English courts, Lord Atkinson said that the council 'allowed themselves to be guided in preference by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour'.¹⁷ The question is not, of course, whether the borough council were wise or cautious in fixing the wage as they did. It is whether the House of Lords, by reading the words 'as they think fit' as 'as they think reasonably fit', and regarding themselves as the arbiters of reasonableness, did not transgress from the judicial into the policy sphere.

By contrast, in 1944, the Court of Appeal unanimously refused to uphold the district auditor's surcharge against the councillors of the Birmingham Corporation, which had decided to pay a fixed weekly war bonus, with the addition of a children's allowance in the case of married men, widowers or widows.¹⁸ The court was obviously right in holding that this was a perfectly reasonable decision, in accordance with public policy and the practice of good employers, but it had some difficulty in over-

¹⁴ *Kruse v. Johnson* [1898] 2 Q.B. 91.

¹⁵ [1925] A.C. 578.

¹⁶ The House was apparently unaware that at that time, as now, the basic wage had already become the cornerstone of Australian industrial law.

¹⁷ [1925] A.C., at p. 594.

¹⁸ *Re Decision of Walker* [1944] K.B. 644. Further illustrations of the differences in judicial outlook on the scope of public powers are provided by the cases of *Middlesex County Council v. Miller* [1948] 1 K.B. 438, and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

coming the obstacle of *Roberts v. Hopwood*. There were, of course, differences between the two cases which the court pointed out. Yet the later decision shows clearly a different approach to the problem of judicial interference in administrative policy. The Court of Appeal, unlike the House of Lords in the earlier case, was unwilling to set itself up as judge of how—short of abuse or bad faith—a local authority, responsible to its rate-payers on the one hand and to the Minister of Health on the other hand, ought to exercise its statutory powers.

These conflicting approaches to the problem of how far the law courts should go in controlling administrative authorities, which are constitutionally responsible to higher administrative or political authorities, are closely parallel to the uncertainties surrounding the notion of 'quasi-judicial', which is the key to the scope of prerogative jurisdiction affecting ministerial authorities. In a somewhat different setting, the same problem arose recently in the important decision of the Court of Appeal in *Blackpool Corporation v. Locker*.¹⁹ The question here was, how far a Minister, exercising statutory powers, could treat the requisition of a private dwelling-house as an internal administrative matter, rather than as the exercise of delegated legislation. If the former interpretation was correct, the householder affected by the requisition had no right to be informed and heard. If the latter view was correct, certain duties of publication, analogous to those incumbent on delegated legislation proper, had to be observed by the Minister.

The Minister of Health had power under the Defence Regulations (1939) 'to such extent and subject to such restrictions as he thinks proper, to delegate all or any of his functions . . . to any specified persons or class of persons'. The Minister had delegated his power to take possession of vacant dwellings to local authorities. He had done so by means of circulars, in which he laid down certain conditions, which were not published to any but the administrative authorities concerned. A local authority requisitioned the defendant's house, in breach of the conditions laid down by the Minister, but the Minister subsequently purported to ratify the action of the local authority.

The Court of Appeal held that the Minister, by delegating his powers, had, for the time being, divested himself of these

¹⁹ [1948] K.B. 349.

powers. He 'retained only those powers which, in his sub-delegated legislation, he had expressly or impliedly reserved for himself'. The circulars, although not disclosed to the public, were held to contain, in a manner binding upon the Minister, the terms of sub-delegation. By refusing to the local authority any privilege of non-disclosure for the circulars, the Court of Appeal emphasised its strongly held view that the terms of ministerial sub-delegation of powers should be made available to the public affected by it. The decision apparently had a wholesome effect upon administrative practice. Requisitioning powers are now delegated, not summarily but for each individual case, and a copy of the instrument is made available to the owner or his agent.²⁰

The wider problem, however, remains. It stems from the increasing difficulty of neatly defining the three branches of government, in accordance with the doctrine of separation of powers. In modern administration, not only are administrative and judicial functions closely mingled—this is illustrated by the extreme difficulty of finding a satisfactory definition of 'quasi-judicial' functions—but legislative and administrative functions are equally mixed. Between the issue of a general norm, applicable to an indefinite number of persons, and the issue of a particular order, affecting a specific individual group of persons or corporations, there is a difference of degree rather than of principle. A circular by the Ministry of Education, which lays down rules on the lighting and sanitation of schools, or the principles which are to govern the appointment of teachers, has legislative as well as administrative elements. Similarly, a requisition order, applicable to certain types of houses, contains both legislative and administrative elements.

In the *Blackpool Corporation Case*, Scott, L.J., described the problem as being one of 'sub-delegated legislation'; where the powers conferred upon a public authority are of the quasi-legislative character, the principles of publication and the rights of objection, developed in regard to primary delegated legislation, should, in the opinion of Scott, L.J., apply. As the distinction between legislative and administrative actions cannot be drawn absolutely, the classification of a particular official act will

²⁰ S. A. de Smith, 'Sub-Delegation and Circulars' (1949), 12 *Modern Law Review*, at p. 43.

still largely depend on a careful weighing of the needs of public administration, against the legitimate interests of the individual.

The difficulty of drawing a clear borderline between administrative functions on the one hand, and judicial or 'quasi-judicial' functions on the other hand, has particular significance for the problem of administrative discretion. It is the main touchstone for the applicability of the prerogative orders of certiorari and of prohibition. If a particular activity of an administrative authority, ministerial or otherwise, is classified as 'quasi-judicial' the courts will quash or review proceedings if they do not conform with 'natural justice'. Despite the many decisions on the subject, an accurate test has not yet been found. Probably it cannot be found—because almost any decision of an administrative character affects the rights of somebody.

The problem, therefore, becomes 'what is a right' in this particular context, and whether, on a general appreciation of the situation, the judicial or the administrative aspects prevail. This is less a matter of logic than of common sense, and the decisions on this subject reflect to a particular degree the conflicting opinions of courts on the respective value of public power and private rights. In the decade following the end of the First World War, the law courts were inclined to take a sceptical and even hostile attitude towards the extension of administration. One result of this was the dangerous extension of the notion of 'quasi-judicial'.

The decision of the Court of Appeal in *R. v. Electricity Commissioners*²¹ is a high watermark. The Electricity Commissioners were a public authority, with strictly defined statutory powers to formulate schemes for the improvement of the electricity supply, and to make orders subject to confirmation by the Minister of Transport. The commissioners made an order by which they constituted a joint authority, in terms which, in the opinion of the Court of Appeal, were *ultra vires*. But the court had further to prove that the scheme constituted the exercise of a quasi-judicial function, although it was subject to confirmation. Atkin, L.J., who delivered the leading judgment, saw in the 'withdrawal from existing bodies of undertakers of some of their existing rights, and the imposing upon them of new

²¹ [1924] 1 K.B. 171.

duties, including their subjection to the control of the new body, and new financial obligations' ²² a quasi-judicial decision.

The learned judge gave the following definition of a 'quasi-judicial' function: 'Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division, exercised in these writs'. ²³ This, of course, circumscribes rather than defines the two main questions, what is a right, and when an authority has a duty to act 'judicially'. If a scheme of the Electricity Commissioners, reorganising the electricity undertakings in a district and subject to approval by the Minister and Parliament, was a 'quasi-judicial' decision, this should apply *a fortiori* to a decision of a textile controller cancelling, without appeal, a licence of a textile dealer. ²⁴ Yet the Privy Council decided that this was an administrative, not a 'quasi-judicial' action. The decision of the controller affected an individual right, namely, the right to trade, far more directly than the decision of the Electricity Commissioners. Nor was it subject to appeal. The Privy Council considered that his action was administrative because it was not regulated by any special procedure. But apart from the duty to hold a local inquiry, this is also true of the Electricity Commissioner's powers. ⁰

Both the House of Lords and the Court of Appeal, in recent decisions, ²⁵ have denounced the idea that a 'quasi-judicial' function could be derived from an obligation to hold an inquiry for the purposes of hearing objections. All these recent decisions indicate a reversal of the earlier judicial tendency to extend the scope of judicial supervision by construing as many administrative actions as possible as 'quasi-judicial'.

Once again, it is not legal logic, but a different appraisal of the respective functions of administrative discretion and private rights, which explains this change of attitude. In the light of much experience, including the difficulty of producing evidence in

²² *Ibid.*, at p. 207.

²³ *Per Atkin, L.J.* [1924] 1 K.B. 171, at p. 205.

²⁴ *Nakkuda Ali v. Jayaratne* (1950) 66 T.L.R. 214.

⁰ For a critical discussion of this decision, see H. W. R. Wade, 'The Twilight of Natural Justice' (1951) 67 *Law Quarterly Review* 103.

²⁵ *Franklin v. Minister for Town and Country Planning* [1948] A.C. 87, and *B. Johnson & Co. v. Minister of Health* [1947] 2 All E.R. 395.

any proceedings where the judicial element would, at most, be a short phase in a prolonged administrative action, the English courts have come to take a more sober and restrained attitude. They have realised the undesirability of piecemeal judicial intervention in a complex administrative process. Consequently, they have restricted the notions both of the 'right' and of the 'duty to act judicially'.

STATUTORY IMMUNITIES AND LEGAL DUTIES

It is probably due to the absence of a systematic consideration of public law problems, to their scattered and somewhat haphazard appearance in common law actions, that there has been so much judicial confusion over the effect of statutory immunities and powers conferred upon public authorities. The accidents which occurred during the last war as a result of the general blackout, and of bombing raids, brought the problem to a head. But it was only after years of confusing decisions that the Court of Appeal, in *Fisher v. Ruislip U.D.C.*,²⁶ brought some clarity into the matter. Under the Defence of the Realm Act, local authorities were absolved from their normal duty to light streets. They also obtained powers to build both surface and underground air raid shelters. A number of accidents happened to pedestrians, cyclists, and motorists, who, in the general blackout, ran into surface shelters, tumbled into fresh bomb-craters, or slipped on the steps of an underground shelter.

One would have thought the legal problem to be simple enough; this statutory immunity absolved the local authority concerned from liability for failure to light, but did not affect its duty to exercise this immunity in accordance with the ordinary standards of care. Obviously, the standard of care had to be determined with full regard to war-time circumstances. It would have been unreasonable to expect a full array of warning lights in a freshly bombed district. Shortages in manpower and material must be taken into account. All these are matters of fact to be weighed in determining the question of negligence. But there should have been no doubt on the principle that a local government, or any other public, authority was subject to the ordinary principles of common law liability, in so far as these did not prejudice its duties as a public authority. Yet the

²⁶ [1945] K.B. 584.

decisions, up to *Fisher's Case*, are contradictory and confused.²⁷ In that case Lord Greene, M.R., provided a fairly clear guide for the future when he said ²⁸ : ' If the right which is being exercised is not a common law right but a statutory right, a duty to use care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded. If, for instance, the statute expressly authorises the doing of a specific act in a defined manner, no liability arises if the act is done in the manner defined, even if by taking some additional precaution a greater degree of safety could be attained. The question, therefore, in any given case appears to resolve itself into this—does the statute, on its true construction, in authorising the act in question, exclude the duty of taking care in its performance? '

A closely-related, though not identical, problem is the degree of immunity from legal liability conferred upon a public authority through a statutory power to do certain things which, without such power, would be an infringement of other people's rights. Such statutory authority is currently divided into 'absolute' and 'conditional', or 'imperative' and 'permissive'.²⁹ The leading authority for this distinction is *Metropolitan Asylum District v. Hill*.³⁰ In that case, a local authority, equipped with statutory power to erect a smallpox hospital, was restrained by injunction from building, and using, it in a place in which it would cause a nuisance to the residents of the neighbourhood, even though no site might be available in the district where no nuisance would be caused. The statutory power, which was in permissive form, was construed as conferring only a conditional permission to build the hospital, provided it could be done without causing a nuisance to private owners. The House of Lords applied the presumption against interference with private rights.

The practical importance of the decision is probably far smaller than its theoretical fame. Most statutory powers conferred upon local authorities, public corporations, and other

²⁷ A survey and synopsis up to the beginning of 1945—i.e., shortly before *Fisher's Case*—is given in Friedmann, 'Statutory Powers and Legal Duties of Local Authorities' (1945), 8 *Modern Law Review*, pp. 31-49.

²⁸ [1945] 2 All E.R. 458, at p. 462.

²⁹ For a suggested definition of these terms, see Salmond, *Torts* (10th ed. by Stallybrass), pp. 42-43.

³⁰ (1881) 6 A.C. 193.

statutory bodies, specifically state the liabilities to which they are subject. Where this is not done, modern decisions seem to take a less destructive view of the meaning of statutory powers than in *Hill's Case*.³¹ But *Hill's Case* is still quoted as the highest authority on the subject, and it serves to obscure the genuine public law problems as they present themselves today.

Statutory powers are normally conferred in the permissive form. For example, the Civil Defence Act, 1939, conferred upon local authorities the power to erect air raid shelters. This power was, in form, permissive. As the degree of danger from air raids varied greatly from area to area, it would have been most inadvisable to confer the power in an imperative form. Yet such legislative language permits no conclusions about the character of the power, and the relative importance of public interest and private rights. It is difficult to imagine an English court granting an injunction, or even damages in lieu of an injunction, to a Poplar or Finsbury resident who complained that the building of an air raid shelter at night, and the use of hydraulic presses, disturbed his sleep. In *Oakes v. Minister of War Transport*,³² Singleton, J., refused damages to a plaintiff injured by a projecting tank trap, constructed under a war-time power. In the absence of negligence, the obstruction which caused the injury had been constructed in the interests of public safety.

In short, the rule of *Hill's Case* needs restating. The construction of a statutory power must be determined neither by the form of the power, nor by any general presumption that private rights should not be interfered with, but by a balance of the interests involved. Despite the vast expansion in the sphere of State functions, in comparison with the period when *Hill's Case* was decided, the modern trend of public policy is to organise public services of all types, inside and not outside the common law. Public corporations are fully liable in contract, tort and quasi-contract, and also for taxes, rates, and charges. Similarly, a statutory power enabling a public authority to run a commercial enterprise should normally be construed as being subject to the ordinary liabilities. Only a test of this character can bring

³¹ Cf. *Edginton v. Swindon Corporation* [1939] 1 K.B. 86; *Oakes v. Minister of War Transport* (1944) 60 T.L.R. 319.

³² (1944) 60 T.L.R. 319.

this problem into line with the rules governing public corporations, statutory immunities, and other rules which are gradually building the foundations of English public law.³³

SOVEREIGNTY AND EQUALITY IN THE RELATIONS BETWEEN
PUBLIC AUTHORITY AND THE INDIVIDUAL

English law has no theory of the State. Gradually, a concept of the State as a juristic personality, and a theory of State functions, is developing out of the maze of historical fictions which treat the person of the King and the Crown as one and the same person. Another cause of retardation in the development of a legal theory of State functions has been the Dicey legacy, namely, the refusal to recognise the duality of the State, or to admit any distinction between sovereign and non-sovereign aspects, and the very existence or necessity of public law. Yet the necessity to distinguish between the different aspects and functions of the State is no less urgent in English than in other legal systems.

In Continental jurisprudence it is, of course, a problem of primary importance. Whether the State or another public authority has acted in its public or private function is the most important, though not the only, factor in determining whether the civil or the administrative courts are competent. A special Conflict Tribunal decides, if necessary, conflicts of jurisdiction. The Janus head of the State—as a fountain of authority (sovereign), and as a subject of private rights (fiscus)—is a familiar feature of Continental jurisprudence. Generally speaking, public authorities have greater discretion in the exercise of their public functions than in their private transactions. But

³³ Another aspect of this basic problem is illustrated by the recent Catchment Board cases, *viz.*, *Kent v. East Suffolk Catchment Board* [1941] A.C. 74; *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 456; *Marriage v. East Norfolk Catchment Board* [1949] 2 K.B. 456. As pointed out above, it is submitted that a public authority, *e.g.*, a Catchment Board, should always be held liable in so far as its legal position can fairly be compared with that of a private contractor. Where, for instance, the Catchment Board has prevented a farmer from having repairs done privately, it should be held liable in negligence, or possibly in contract, for any damage which results. Where it has entered into an agreement which can fairly be interpreted as a contract, it should be possible to hold the Board liable in respect of any breach on its part. Where, on the other hand, it can be shown that such liability would impede the carrying out of paramount public functions, the statutory power should be construed as excluding common law remedies.

definite rules of liability have been worked out. Both German and French law recognise the 'administrative contract'. Damages and injunctions can be granted before administrative courts.

The English plaintiff, on the other hand, fails entirely unless he succeeds in convincing the court of the existence of a common law contract, tort, or an enforceable statutory duty. The government department or the borough council will either have to answer according to common law, or it can withdraw behind the protective shield of administrative discretion. Hence, some recent decisions on the problem of contractual liability of government and other public authorities acquire particular significance. They serve to illustrate, from yet another angle, the cardinal problem of the relation of administrative discretion and legal duty.

The first case illustrating the problem, without throwing much light upon it, is *Amphitrite v. The King*.³⁴ During the First World War, a Swedish ship had, before sailing to England, obtained a promise from the British Legation at Stockholm that the ship would 'earn her own release', if she carried a cargo of at least 60 per cent approved goods. On the second voyage, made after an express renewal of the promise, the British Government refused clearance, unless it was arranged through the officially recognised Swedish Shipping Committee. The owners were not entitled to apply to that committee because the ship had formerly traded with Germany. The British Government refused its release, and the owners were compelled to sell the ship. They sued for breach of contract. War-time cases often make bad precedents, but Rowlatt, J., supported his refusal to award damages, by the theory that there was no contract but merely an expression of intention to act in a particular way. 'My main reason for so thinking is that it is not competent for the Government to fetter its future executive action'.

Although this decision has ever since figured in textbooks and casebooks on constitutional law, its authority, such as it is, has been greatly weakened by some recent decisions. It would, however, be wrong to assume that these decisions represent more than a small fraction of the cases in which there are genuine contracts between public authorities and private citizens. Con-

³⁴ [1921] 3 K.B. 500.

tracts between government departments and private firms are normally made under standard conditions which provide for arbitration.³⁵ In many other cases, the fact that a government department can bind itself by an ordinary commercial contract is taken for granted. Thus, in a leading Australian constitutional case,³⁶ the government department controlling the New South Wales Tourist Bureau had contracted with a newspaper for a series of advertisements. Payment was to be made out of a general fund at the disposal of the Prime Minister. A subsequent government attempted to repudiate the contract. The High Court decision was mainly concerned with the problem whether such a contract could be enforced without specific appropriation of funds (a question which it answered in the positive). The court did not doubt that a contract of this type, between a government agency and a private business firm, was normal and legitimate.

Lastly, a vast sphere of transactions to which public authority is a party has been removed from the public law sphere by legislation. The public corporations which operate Britain's nationalised industries, and a considerable number of social services, are clearly liable in contract and tort, like every private law subject.³⁷

There remain some important cases illuminating the borderland between administrative discretion and binding promise. In *Robertson v. Minister for Pensions*,³⁸ an officer who claimed that his disability was due to military service had received a written reply from the War Office, which contained the following passage: 'I now write to let you know that your case has been duly considered, and your disability has been accepted as attributable to military service'. In reliance on that letter, the claimant obtained no further medical opinion, and took no other steps regarding his disability. The Minister of Pensions later disclaimed liability. Denning, J., held that the War Office had acted as an agent for the Crown. It had thus bound the Crown as a whole, including other government departments.

³⁵ *E.g., Standard Conditions for Government Contracts for Stores Purchases* (1947 ed.), s. 23.

³⁶ *N.S.W. v. Bardolph* (1935) 52 C.L.R. 455.

³⁷ A similar conclusion was reached in France by the administrative courts some years ago. Cf. Waline, *Droit Administratif* (4th ed. 1946), p. 57.

³⁸ [1948] 2 All E.R. 767.

Denning, J., rejected the doctrine of executive necessity, and dismissed the *Amphitrite Case* on the somewhat dubious ground that it was not based on the doctrine of executive necessity, but on the now doubtful right of the Crown to dismiss its servants at pleasure. The learned judge was obviously anxious to bring this case as close as possible to the ordinary rules of legal liability, stating ³⁹: 'If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it, unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like, none of which appears here. There are many cases in the books which establish that an unequivocal acceptance of liability will be enforced, if it is intended to be binding, intended to be acted on, and is, in fact, acted on. In my opinion, if a government department in its dealings with a subject takes it on itself to assume authority on a matter with which he is concerned, he is entitled to rely on it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also, and as the Crown is bound, so are the other departments, for they also are but agents of the Crown'.

The decision of the Court of Appeal in *Turberville v. West Ham Corporation* ⁴⁰ shows a similar approach. A local education authority, by a resolution made in 1939, had decided to give leave of absence to their employees who joined the Forces with their approval, and to make up their pay to the amount of their salary 'received by them at the date of their being called up for training or service, with such increments, if any, of their grades, which they would have received but for such leave of absence'. The plaintiffs, two teachers employed by the council, were called up in 1940, and until March 31, 1945, received from the council the sums to which they were entitled under the resolution. An order of the Minister of Education in 1945 directed local education authorities to pay to teachers improved scales of pay as from April 1, 1945. The council wrote to one of the plaintiffs, to the effect that they would make the necessary adjustments in their payments, as soon as they had reached a

³⁹ [1948] 2 All E.R. 767, at pp. 769-770.

⁴⁰ [1950] 2 All E.R. 54.

decision on the applicability of the new scales. Later, however, the council informed the plaintiffs that they could not augment their Service pay to bring it up to the new rates. The plaintiffs sued for the difference between the pay received, and that to which they claimed to be entitled under the new scales.

The council pleaded *inter alia*, the Limitation Act, 1939, under which 'no action shall be brought against any person for any act done . . . in execution, or intended execution . . . of any public duty or authority, . . . unless it is commenced before the expiration of one year from the date on which the cause of action accrued'. The Court of Appeal rejected the defence and held the council liable. As Singleton, L.J., put it, 'they entered into a contract voluntarily, and, when they made payments under such a contract, they did so in pursuance of the contract and not in the execution of any public duty'. The language of the Limitation Act compelled the court to make the unfortunate choice between 'public duty' and 'voluntary contract'. The purpose of the decision was, of course, to reinforce the sphere of contractual liability against that of administrative discretion, and to strengthen the position of the individual in the manifold legal arrangements which he now has with public authorities of all kinds.

A decision of the Court of Appeal, which has already been quoted in a different context,⁴¹ shows, however, that contractual liability will not be allowed to hamper the execution of political and administrative responsibilities. Lord Greene, it will be recalled, who delivered the judgment of the court, strongly emphasised that a planning authority could not be presumed or permitted to bargain away the exercise of its planning powers by private contract. To this, it might possibly be objected that the exercise of planning powers in the national interest would not necessarily be affected by an obligation to pay damages for promises previously given. It would conclusively dispose only of a suit for specific performance. Presumably, the court's answer to this lay in the brief reference to the statutory compensation provided in the Act for expenses incurred in interim development.

This decision illustrated vividly, if somewhat haphazardly,

⁴¹ *Ransom and Luck v. Surbiton Borough Council* [1949] Ch. 180, see above, p. 377.

the cardinal problem of public law : how to preserve the legal security of the individual, in a society in which more and more legal relations pass from the private to the public sphere, without hampering the needs of administration in the social welfare State.

CONCLUSIONS

It is a rather chequered picture which emerges from this discussion of public law problems, as illustrated by recent British legislation and the decisions of the courts. As yet, the full importance of public law problems is seldom recognised or appreciated in the common law setting in which they usually appear. Nevertheless, it is far easier now than even a few years ago, to extract a number of tentative principles from legislation and decided cases.

1. Not only the legislature but the courts are gradually coming to abandon the former presumption—sanctioned by textbook rules of statutory construction—of interpreting a given provision or legal dispute in favour of the integrity of private rights. War-time decisions tend to go to the other extreme, and place the public interest first, even at the expense of well-established rules of construction. Generally, however, the predominant judicial attitude is now one of balancing the interests concerned, without any predisposition in favour of either public interest or private rights.

2. The principles limiting administrative discretion are beginning to emerge more clearly. Tentatively, the position might be formulated as follows :

- (1) Where the imposition of legal liability (in tort or contract, through the imposition of statutory duties, or through the construction of ministerial actions as quasi-judicial) would interfere with the execution of public duties, it will not be imposed on a public authority.

An application of these principles should lead to a much-needed clarification of the legal effects of statutory powers. Whether all specific statutory powers, conferred upon a public authority, should be construed as overriding private rights or not, should be made dependent, not on the form of the power,

nor governed by a presumption in favour of private rights, but by the purpose and nature of the power. Only where the urgency of the public interest demands it, but not otherwise, should it be construed as overriding private rights.

- (2) Subject to these reservations, however, public authorities are now increasingly subjected to the same legal duties as everybody else.

(a) In the field of tort, it is now clear that statutory immunities or powers do not convey a general immunity from duties of care towards the public. The rule which limits the liability of highway authorities to acts of misfeasance is an anomaly ripe for removal. The rule has, however, been eroded by recent English decisions.

(b) In the field of contract, there is an increasing tendency to treat promises given by public authorities, including the Crown, as contractual, rather than administrative. Considerations of public policy may, however, exclude contractual liability. The borderline will to some extent be determined by the courts' opinion on the respective importance of social welfare and planning powers on the one hand, and the rights of the individual on the other.

3. Since the Crown Proceedings Act, 1947, and the increasing practice of constituting public authorities, both of a general and of a functional character, in the form of public corporations, the scope of legal privileges enjoyed by public authority has been greatly reduced. Nevertheless, it is still of great importance in Australian law.

The emergence of these public law principles confirms the opinion that the pressure of social problems is a more powerful factor in legal evolution than technical conditions. The public law problems which legislature and courts now face in common law countries are substantially the same as in Continental

systems of similar political and social structure. It may be that common law systems will eventually develop a hierarchy of administrative courts, and thus help to systematise administrative law.

Meanwhile, public law problems have to be solved within the framework of the common law tradition. Recent developments, both legislative and judicial, show that the adaptability of the common law, which is the pride of English lawyers, can meet this new challenge as it has met many others. It is the jurist's duty to assist both legislature and judges in this task of adaptation.

THE UNITED STATES SUPREME COURT AND ADMINISTRATIVE LAW

BERNARD SCHWARTZ

A SERIES of lectures on current legal problems delivered some fifty years ago would hardly have included one devoted to administrative law in the United States. The English lawyer could not be expected to show an interest in developments abroad in a field whose existence he had been accustomed to deny at home. If, however, some fifty years ago it required the 'prophetic sense of a Maitland'¹ to realise the great growth of administrative law, today awareness of that growth has become a commonplace. Nor, it should be noted, is the realisation of this confined to members of the legal profession. Indeed, equally significant to the student of administrative law as the tremendous extension of his subject, has been the widespread public interest displayed in it in recent years.

Public concern over trends in this field reflects an increasing awareness of its importance in dealing with the many problems arising out of the expansion of the role of the State. Human existence is inconceivable outside of society.² At the same time organised society threatens to overwhelm the individual. 'There is not a moment of his existence where modern man does not find himself in contact with government and its agents'.³ In the contemporary State, government tends more and more to become the all-dominant factor in society, by taking over or controlling the functions hitherto performed by private institutions. As it does so it comes into ever-increasing contact with the individual life. 'It is in this ceaseless contact of the individual with the State that the danger of arbitrariness has especially arisen'.⁴

The dangers arising out of the expansion of State power were

¹ Sieghart, *Government by Decree* (1950), p. 1.

² Pinto, *Éléments du Droit Constitutionnel* (1948), p. 23.

³ Duguít, *Manuel de Droit Constitutionnel* (1923), p. 39.

⁴ *Ibid.*, at p. 40.

well put a generation ago by Lord Macmillan's Committee on Finance and Industry: 'The most distinctive indication of the change of outlook of the government of this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people. A study of the Statute Book will show how profoundly the conception of the function of government has altered. Parliament finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty and government there is an age-long conflict. It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets'.⁵

It is the task of administrative law to avoid at least part of the danger referred to by Lord Macmillan's committee. It does so by ensuring that governmental functions will be exercised 'on proper legal principles'⁶—'according to the rules of reason and justice'⁷—and not at the mere caprice of the magistrate. It defines the remedies available to the citizen when he has been adversely affected by improper governmental action.

In determining whether a system of administrative law has adequately fulfilled its task, comparison with other systems can often prove most useful. This is especially true when the law compared is based upon common law traditions and techniques, similar to those upon which the law of this country is grounded. It is from this point of view that a survey of recent administrative law trends in the jurisprudence of the United States Supreme Court should be of value in this country. An understanding of the more significant developments on the other side of the Atlantic can aid the English legal profession in its evaluation of analogous tendencies here.

⁵ Quoted in *Report of the Committee on Ministers' Powers* (1932) (Cmd. 4060), at p. 5.

⁶ *Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue* [1940] A.C. 127, at p. 136.

⁷ *Sharp v. Wakefield* [1891] A.C. 173, at p. 179.

THE ATTITUDE OF THE PRESENT SUPREME COURT

Professor Friedmann has recently called attention to the 'fundamental changes of legal ideology reflected in the jurisdiction of the Supreme Court of the United States during the past ten years'.⁸ The changed attitude of the Court is well illustrated in its opinions dealing with the field of administrative law. Foremost in those opinions is a recognition of the place of the administrative process in modern government. Modern administrative tribunals, reads an oft-quoted opinion delivered in 1940, are the outgrowth of conditions far different from those which gave rise to the judicial process. 'To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was, a quarter of a century ago, the opinion of eminent spokesmen of the law'.⁹

Earlier courts have not been as friendly towards the exercise of administrative authority. It can, indeed, be asserted that, historically, law and administration have been regarded as rival agencies of social control in the United States. The rule of law was considered to require the subordination of administration, and attempts to allow it any scope were considered as inroads into the constitutional doctrine. This 'bad adjustment between law and administration, traditional in common law countries for historical reasons, gave rise to conditions of mutual distrust on the part of courts and administrative agencies'.¹⁰

Yet, if the Supreme Court could, in 1936, compare administrative methods to those 'intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640',¹¹ such 'sanguinary similies'¹² are now a thing of the past. To the present court, judicial and administrative agencies are not to be regarded as rivals. The problem today is seen not in terms of one or the other seeking to take over the field. Both law and administration are recognised

⁸ (1948) 64 *Law Quarterly Review*, at pp. 545, 547.

⁹ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, at p. 142.

¹⁰ Pound, *Administrative Law* (1942), p. 105.

¹¹ *Jones v. Securities and Exchange Commission* (1936) 298 U.S. 1.

¹² *Ibid.*, at p. 33, per Cardozo, J.

as complementary, not as competing, elements of social control.

The court has recognised, in the words of Stone, C.J., that law and administration 'are not to be regarded as wholly independent and unrelated instrumentalities of justice. . . . Neither body should repeat in this day the mistake made by courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded as an alien intruder, to be tolerated if must be, but never to be aided or encouraged by the other, in the attainment of the common aim'.¹³

As Frankfurter, J., who is, perhaps, the outstanding administrative lawyer on the Supreme Court today, has pointed out, the attitude of the judge towards the role of the administrative process is of cardinal significance in determining the approach taken in particular administrative law cases. 'I think nothing is more important with reference to every one of the issues . . . the relation between the administrative and the judiciary, the relation between the administrative and the legislature, what powers may be delegated, what powers should be delegated, what should be the nature and scope of judicial review, what procedure is appropriate within the administrative . . . —every one of those issues is in the ultimate analysis referable to the attitude you take toward the necessity of the legal development that we call administrative law'.¹⁴

In view of the present Supreme Court's opinion of that 'necessity', it is only natural that it should not view administrative authority as jealously as did its predecessors. At the same time, however, as we shall see, the court's recognition of the place of administration has not made it lose sight of the need for procedural safeguards and judicial control, to protect those adversely affected by administrative action.

DELEGATIONS OF POWER

The extent of delegated legislation in this country has become almost a commonplace since Sir Cecil Carr called attention to it in 1921. Yet in America, too, as the Attorney General's Committee on Administrative Procedure aptly pointed out, 'the

¹³ *United States v. Morgan* (1939) 307 U.S. 183, at p. 191.

¹⁴ Frankfurter, *Summation of the Conference* (1938) 24 *American Bar Association Journal*, at pp. 282, 283.

promulgation of general regulations by the executive acting under statutory authority, has been a normal feature of Federal administration ever since the Government was established'.¹⁵ The need for delegation of legislative power to the executive was clearly explained in the *Report of the Committee on Ministers' Powers*. 'The truth is,' reads the Committee's conclusion on the subject, 'that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires'.¹⁶ Its recent decisions on the subject indicate that the United States Supreme Court shares the Committee's views. To its mind, the delegation of authority to the executive branch is something that inheres 'in the very necessities of our situation'.¹⁷

Objections to such delegations, in America as in this country, have been based upon the doctrine of the separation of powers. 'The legislature cannot transfer the power of making laws to any other hands, for, it being but a delegated power from the people, they who have it cannot pass it over to others'.¹⁸ Yet, as Frankfurter, J., asserted, in referring to the separation of powers, the 'practical demands of government preclude its doctrinaire application', for 'we are dealing with what Madison called a "political maxim" and not a technical rule of law'.¹⁹

There are many cases, the learned judge pointed out, which show that there are necessary areas of interaction among the departments of government. 'Functions have been allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By these means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modern government impossible'.²⁰

The Supreme Court has refused to invalidate legislation

¹⁵ *Report of the Attorney General's Committee on Administrative Procedure* (1941), at p. 97.

¹⁶ p. 23. Cf. *Report of the Attorney General's Committee*, p. 14.

¹⁷ Frankfurter. See note 14 (*supra*), at p. 284.

¹⁸ Locke, *Of Civil Government*, s. 141.

¹⁹ Frankfurter, *The Public and its Government* (1930), at p. 77.

²⁰ *Ibid.*, at p. 78.

merely because it, in form, delegates legislative power to administrative authorities. Its approach to the delegation problem has shifted from one of formal application of an inflexible maxim against delegations of legislative power, to one of determining whether the legislative grant of power is in fact inordinate. And, with this, the focus of judicial inquiry has centred upon the adequacy of the standards contained in the enabling legislation.

Under present day American theory, legislative power can be conferred upon the executive branch, provided that the grant of authority is limited by prescribed standards. 'Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard'.²¹ The discretion conferred must not be so wide that it is impossible to discern its limits. There must instead be an ascertainable legislative intent to which the exercise of the delegated power must conform.

A somewhat similar principle was expressed by the Committee on Ministers' Powers. 'The precise limits of the law-making power which Parliament intends to confer on a minister should always be expressly defined in clear language by the statute which confers it; when discretion is conferred, its limits should be defined with equal clearness'.²²

The recommendation of the British Committee on this point has received 'scant attention'²³ in this country. The requirement of standards imposed by the United States Supreme Court has, of course, been of much greater importance, so far as American law is concerned. In this country, excessive delegations of legislative power are political questions; in the United States they are primarily judicial.²⁴ The consequences of this are shown by *Schechter Poultry Corp. v. United States*,²⁵ where an Act of Congress was held invalid because of its failure to contain any standards to limit the exercise of the power delegated.

In the opinion of the Supreme Court, as at present constituted, the need for an ascertainable standard in legislation delegating authority to the executive, does not mean that the Congress must limit the power granted by elaborate prescriptions

²¹ *United States v. Chicago, M.St.P., and P.R.R.* (1931) 282 U.S. 311, at p. 324.

²² *Report*, p. 65.

²³ Carr, *Concerning English Administrative Law* (1941), p. 175.

²⁴ Weeks, 'Legislative Power versus Delegated Legislative Power', 25 *Georgetown Law Journal*, pp. 314, 330.

²⁵ (1935) 295 U.S. 495.

of detail. It has been felt that if the legislature were required to specify in minute detail the course to be followed by the administrative agency, much of the advantage of delegation would be lost. The court has consequently taken a most liberal attitude towards broad, general standards of the type which have been contained in recent regulatory statutes. This can be seen from its opinions dealing with grants of power under the Communications Act of 1934.

Under that Act the Federal Communications Commission is given wide authority to regulate radio broadcasting. 'The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience or necessity", a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit"'.²⁶ In a field where the subject matter of regulation is as fluid and dynamic as radio, a detailed prescription of standards could have made effective administration impossible. Congress would have frustrated 'the purposes for which the Communications Act of 1934 was brought into being by attempting an itemised catalogue of the specific manifestations of the general problems, for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details, in regulating a field of enterprise the dominant characteristic of which was the dominant pace of its unfolding'.²⁷

But where does this leave the requirement of an ascertained standard in enabling legislation? Plainly, a standard such as that contained in the Communications Act is not mechanical or self-defining; it implies wide areas of judgment and, therefore, of discretion.²⁸ If such a broad standard is considered adequate then has not the requirement of a defined standard become a purely formal one and, if that is the case, has not the American law, in practice if not in theory, become similar to that in this country, where there are no constitutional limitations to restrain Parliament from delegating authority how it will?

²⁶ *National Broadcasting Co. v. United States* (1943) 319 U.S. 190, at p. 216.

²⁷ *Ibid.*, at p. 219. The most recent example of the court's attitude is contained in *Secretary of Agriculture v. Central Roig Refining Co.* (1950) 70 Sup.Ct. 403.

²⁸ Paraphrasing Frankfurter, J., *ibid.*, at p. 407.

The Supreme Court would answer this by asserting that the generality of the phrasing in a statute, such as the Communications Act of 1934, does not mean that the applicable standards are too vague to canalise administrative discretion effectively. The statutory language is not to be read in a vacuum; a general standard may be given specific form and content when looked at in the light of the statutory scheme and its background. Thus the standard of 'public interest' in the Communications Act is not so vague and indefinite as to be unconstitutional. 'It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determination. The purpose of the Act, the requirements it imposes, and the context of the provision in question, show the contrary'.²⁹

ADMINISTRATIVE PROCEDURE

Our analysis, thus far, has indicated that the present Supreme Court's recognition of the place of the administrative process has made it not unsympathetic to claims based upon the need for effective administration. But the very recognition of the administrative role, and the need for the delegation of wide authority to enable that role properly to be performed, has led to increasing emphasis in recent years upon the manner in which administrative power is exercised. In this respect, of prime importance has been the growing insistence upon the development of adequate procedural safeguards.

'It has been truly said', reads the *Report of the Committee on Ministers' Powers*, 'that, however much a minister in exercising such [*i.e.*, judicial] functions may depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against "natural justice"'.³⁰ The American equivalent of 'natural justice' has been the doctrine of procedural due process. That doctrine has ensured that those affected by particular administrative action have been afforded, at least, the minimum procedural safeguards of notice and hearing. It has, however, been widely felt in recent years that the safeguards afforded by the due process doctrine have not, of themselves, proved adequate. 'The con-

²⁹ *National Broadcasting Co. v. United States* (1943) 319 U.S. 190, at p. 226.

³⁰ p. 75.

viction developed, particularly within the legal profession, that [administrative] power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use'.³¹

Apprehension over administrative impartiality and response to growing discontent, was reflected in a number of Bills offering various remedies. The executive branch of the Federal Government also became concerned as to whether the structure and procedure of the many administrative agencies was conducive to fairness.³² This led to the appointment of the Attorney-General's Committee on Administrative Procedure, whose contribution to American administrative law has been equivalent to that made by the Committee on Ministers' Powers to the subject in this country.

The result of this widespread concern and inquiry has been the enactment of the Administrative Procedure Act of 1946. That Act 'is a new, basic and comprehensive regulation of procedures in many agencies'.³³ As the first attempt by Congress to state the essentials of the procedures to be followed by the administrative process, it has been characterised as 'the beginning of a new era in administrative law'.³⁴ in the United States. Hitherto, the control of administrative procedure has been limited to intervention by the courts, based upon the concept of procedural due process. With the Act of 1946 the American legislature has now taken a vital part.

A statute is not, however, self-executing. The legislative 'ought' must run the gauntlet of judicial interpretation before it attains the practical status of an 'is'. This is true in all legal systems; but it is especially true in the United States, where the courts of law play so prominent a constitutional role. The Administrative Procedure Act, like other legislation, would lose much of its practical efficacy if its terms were to be read by the courts in a decimating spirit.

It was feared by some that the Supreme Court would construe the Administrative Procedure Act in so restricted a manner that it would lose much of its remedial effect. The present court's attitude towards the administrative process—which, as we

³¹ *Wong Yang Sung v. McGrath* (1950) 70 Sup.Ct. 445, at p. 448.

³² *Ibid.*

³³ *Ibid.*

³⁴ Arthur T. Vanderbilt, *Federal Administrative Procedure Act and the Administrative Agencies* (1947) iv.

have noted, has been one of marked friendliness—could well have led it to view with hostility a statute which interfered with administrative procedural autonomy, and to interpret it so as to limit its effect wherever possible.

The court has, however, given a clear indication that it does not intend to construe the Administrative Procedure Act in so restricted a manner. The court's attitude here was well expressed by Jackson, J., in *Wong Yang Sung v. McGrath*,³⁵ the first important case dealing with the Act. 'The Act . . .', reads his opinion, 'represents a long period of study and strife; it settles long continued and hard-fought contentions and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself, if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear'.³⁶

Of the several administrative evils sought to be cured or minimised by the Administrative Procedure Act, one of the most important was the so-called concentration of functions in administrative agencies—*i.e.*, the practice of embodying in one person or agency the duties of prosecutor and judge. This merger of powers in many agencies has been one of the most controversial features of American administrative law, and the disputes which have arisen over it are not unlike those which have arisen over basically similar problems in this country—for example, over the authority of the Minister of Health to confirm housing schemes which have, to a large extent, been influenced by consultations between officers of the local authority and the Ministry's own officials, or, more recently, over the power of the Minister of Town and Country Planning to make orders under the New Towns Act, 1946.

One of the fundamental purposes of the Administrative Procedure Act was to deal with the practice of concentrating the duties of prosecutor and judge in one person or agency. The theme which, with variations in language, was reiterated throughout the legislative history of the Act, was voiced in 1937 by the

³⁵ (1950) 70 Sup.Ct. 445.

³⁶ *Ibid.*, at p. 450.

President's Committee on Administrative Management. 'The independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge . . . the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness: it weakens public confidence in that fairness'.³⁷

The Administrative Procedure Act seeks to minimise the evils resulting from the concentration of functions by setting up within each agency a group of semi-independent officers to whom alone are to be assigned the task of hearing cases, and who are to be insulated from all phases of a case other than hearing and deciding. But this portion of the Act, according to its terms, applies only to cases of adjudication 'required by *statute*' to be determined after a formal agency hearing.³⁸ In the *Wong Yang Sung Case*, to which reference has already been made, the agency concerned contended that these provisions of the Act did not apply to it, for its enabling legislation did not expressly demand a hearing. The case involved a proceeding to deport an alien and, while it is true that there is no express requirement for any hearing in the American statute authorising deportations, it is clear that it would be contrary to Anglo-American conceptions of fair play—expressed in the due process clause on the other side of the Atlantic—to allow an alien to be deported without giving him an opportunity to be heard in answer to the charges against him.

The question to be decided, therefore, is that of determining whether the word '*statute*' in the Administrative Procedure Act is to be applied literally, with a resultant narrowing in the application of the Act, or whether it can be construed so as to include the concept of due process, thus making its procedural safeguards available in the case of an alien like *Wong Yang Sung*. The answer to this question will depend to a large degree upon the attitude of the Supreme Court towards the Administrative Procedure Act. Is the Act an unwarranted restriction upon the flexibility of the administrative process, and as such to be construed as narrowly as possible, or is a broader approach to be preferred?

³⁷ *Ibid.*

³⁸ Administrative Procedure Act, s. 5.

In the *Wong Yang Sung Case* the court, in holding that the provisions of the statute were applicable to deportation proceedings, indicated that the narrow approach is not the way to read remedial legislation such as the Administrative Procedure Act. 'It is true also of Acts of Congress that "The letter killeth" . . . in enacting legislation Congress is not engaged in a scientific process which takes account of every contingency. Its laws are not to be read as though every *i* has to be dotted and every *t* crossed'.³⁹ 'It is the plain duty of the courts', asserted Jackson, J., in the *Wong Yang Sung* opinion, 'regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns'.⁴⁰

The administrative hearing in the *Wong Yang Sung Case* was, to the court's way of thinking, a perfect example of the practices which the provisions of the Administrative Procedure Act were aimed at. The deportation hearing was held, not before an independent officer insulated from those engaged in prosecuting functions, but before an immigrant inspector whose duties included investigation of like cases and, very often, the conduct of the prosecution in the case he was assigned to hear.

'The Administrative Procedure Act', said Jackson, J., 'did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were intended to ameliorate the evils from the co-mingling of functions, as exemplified here, is beyond doubt. And this co-mingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings, where we frequently meet with a voteless class of litigants, who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved, and who often do not even understand the tongue in which they are accused. Nothing, in the nature of the parties or the proceedings, suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies'.⁴¹

The fears of those who thought that the effectiveness of the

³⁹ Frankfurter, J., dissenting, in *United States ex rel Knauff v. Shaughnessy* (1950) 70 Sup.Ct. 309, at p. 315.

⁴⁰ *Wong Yang Sung v. McGrath*, 70 Sup.Ct., at p. 452.

⁴¹ *Ibid.*

Administrative Procedure Act might be impaired by the Supreme Court have been proven by the *Wong Yang Sung Case* to be groundless. The court's feeling in favour of administrative autonomy has given way in the face of the express legislative intent to work a general reform in administrative procedures. The basic purpose of the Act was to 'introduce greater uniformity of procedure and standardisation of administrative practice, among the diverse agencies whose customs had departed widely from each other'.⁴² It was its deference to the Congressional desire to accomplish this that led the court to interpret the Act, in the *Wong Yang Sung Case*, along lines which might be considered in this country to be contrary to the correct canons of statutory construction.⁴³ For, as Jackson, J., pointed out, 'Any exceptions we may find to its applicability would tend to defeat this purpose'.⁴⁴

JUDICIAL REVIEW—AVAILABILITY

Under an adequately developed system of administrative law the citizen who has been adversely affected by improper governmental action must be given a remedy. If that remedy is to be an effective one, it should be available before some body which is wholly independent of the active administration. In the common law world, such remedy has traditionally been afforded before the ordinary courts of law.

The importance of such a judicial remedy was stated in strong language by the Committee on Ministers' Powers. 'We are . . . unanimously of opinion', reads the Committee's conclusion on this point, 'that no considerations of administrative convenience, or executive efficiency, should be allowed to weaken the control of the courts, and that no obstacle should be placed by Parliament in the way of the subject's unimpeded access to them'.⁴⁵ In Anglo-American theory the availability of the judicial remedy is intimately connected with the doctrine of the rule of law. 'For just in so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy

⁴² *Ibid.*, at p. 450.

⁴³ Yet, as Professor Goodhart has pointed out, 'the strictly literal method of interpretation is undesirable if it leads the court to reach a conclusion which it is reasonably clear that Parliament could not have intended' (1942) 58 *Law Quarterly Review*, pp. 3, 4.

⁴⁴ *Loc. cit.*, *supra*, note 42.

⁴⁵ *Report*, p. 45.

of law, though at one remove and as a sort of secondary line of defence'.⁴⁶

Whether judicial review is available in a given case depends in the first place upon the provisions which the legislature has seen fit to make in the matter. Thus, it is clear, as stated by Swift, J., in a leading case in this country, that appeals from administrative decisions cannot be taken in the absence of statutory provisions. 'An appeal is the creature of statute . . . If a person desires to appeal from one tribunal to another, be the former a judicial tribunal in the ordinary sense of the term, or a tribunal such as the Minister of Health and his department, for purposes such as I am considering in this case, he can only do so if a statute has given him the right, and only within the limits which the statute giving him the right lays down'.⁴⁷

The absence of statutory provisions for appeal to the courts does not, however, necessarily mean that all access to the judiciary is barred. Even in the absence of statute the courts have developed means for controlling administrative officers in their relation to private right.⁴⁸ In this country such control is effected through the so-called 'prerogative' writs. As stated by Atkin, L.J., in a famous passage, 'Whenever any body of persons, having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs'.⁴⁹

In the United States, too, judicial review in the absence of statute has been obtained through the prerogative writs.⁵⁰ One would have thought, indeed, that the availability of such non-statutory review had been clearly established in a system such as the American one, where the ordinary courts play so important a role in controlling the other branches of government. There has, however, been a strong conflict in the present Supreme Court on the question of whether judicial review is available at all where Congress has been silent on the subject.

The view that judicial review is normally not available in

⁴⁶ Dickinson, *Administrative Justice and the Supremacy of Law* (1927), p. 37.

⁴⁷ *Re Bowman* [1932] 2 K.B. 621, at p. 633.

⁴⁸ *Report of the Attorney General's Committee*, p. 80.

⁴⁹ *R. v. Electricity Commissioners* [1924] 1 K.B. 171, at p. 205.

⁵⁰ The common remedy in the federal courts has been the equitable injunction directed against administrative officials.

the absence of express statutory provision has been consistently advocated by Frankfurter, J. As he has seen the problem, the judicial authority in particular cases depends upon Congressional delegation of the review power. 'When judicial review is available and under what circumstances, are questions . . . that depend upon the particular Congressional enactment under which judicial review is exercised'.⁵¹

It follows from this that, unless there is an express statutory provision for review, access to the courts is not available in the particular case. Thus, in the same learned judge's view, 'To ascertain whether an order of the Interstate Commerce Commission is open to judicial review, it should be rigorously borne in mind that jurisdiction to review such an order must have been conferred by Congress. . . . Unless Congress has chosen to give the courts oversight of a determination by the Commission, the courts have not the power of oversight where, as here, the Constitution does not require it'.⁵²

In his constant adherence to this principle Frankfurter, J., has usually not had the concurrence of a majority of the Supreme Court. The case which, perhaps, best illustrates how the approach of most of the justices differs from that of Frankfurter, J., on this point is *Stark v. Wickard*.⁵³ There, the majority of the court held that a review action could be maintained even though there was no direct judicial review granted by statute. 'Here, there is no forum', Reed, J., asserts, 'other than the ordinary courts, to hear this complaint. When . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction'.⁵⁴

The review power of the courts in these cases, is an inherent one which arises out of the delegation to them of the 'judicial power' under the Federal Constitution. 'When Congress passes an Act empowering administrative agencies to carry on govern-

⁵¹ *National Labor Relations Board v. Cheney Lumber Co.* (1946) 327 U.S. 385, at p. 388.

⁵² Dissenting, in *United States v. Interstate Commerce Commission* (1949) 337 U.S. 426, at p. 449.

⁵³ (1944) 321 U.S. 288.

⁵⁴ *Ibid.*, at p. 309.

mental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement, entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action, fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances, is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction'.⁵⁵

The refusal of the majority of the Court to follow Frankfurter, J.'s thinking in the *Stark v. Wickard* type of case is to be commended. Even in this country, as has been pointed out, the judiciary is not powerless in these cases, in the absence of express parliamentary attempts to bar access to the courts. An administrative tribunal here 'is not an autocrat, free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals'.⁵⁶ As stated by Brett, L.J., in an important case on the availability of non-statutory review, 'Whenever the legislature entrusts to any body of persons, other than the superior courts, the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons . . . attempt to exercise powers beyond those given to them by Act of Parliament'.⁵⁷

Under Frankfurter, J.'s view, in the absence of statutory review provisions, an administrative order is final and not subject to review by any court, even though entered arbitrarily, without substantial supporting evidence, and in defiance of law. 'Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships'.⁵⁸

JUDICIAL REVIEW—SCOPE

Although the Supreme Court has thus insisted upon the availability of judicial review, even where the legislature has failed

⁵⁵ (1944) 321 U.S. 288.

⁵⁶ Farwell, L.J., in *R. v. Board of Education* [1910] 2 K.B. 165, at p. 178.

⁵⁷ *R. v. Local Government Board* (1882) 10 Q.B.D. 309, at p. 321.

⁵⁸ *United States v. Interstate Commerce Commission* (1949) 337 U.S. 426, per Black, J., at p. 433.

to provide for such review, this does not mean that it has joined the ranks of those seeking to broaden the scope of judicial review. 'Even when resort to courts can be had to review a Commission's order', reads an important administrative law opinion, 'the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable'.⁵⁹

As the court sees it, the judiciary has nothing to do with the wisdom of challenged administrative action. As expressed by Frankfurter, J., in a case where certain regulations were assailed as arbitrary and capricious: 'If this contention means that the Regulations are unwise . . . we can only say that the appellants have selected the wrong forum for such a plea. . . . We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress'.⁶⁰

The Supreme Court's approach to the scope of review has been based upon the well-known distinction between questions of *law* and questions of *fact*. As to the latter, the primary responsibility of decision is with the administrative expert. It is only the former that are to be decided judicially. 'If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law'.⁶¹

In this respect, the approach of the American Court has been similar to that followed by the courts in this country. Here, too,

⁵⁹ *Rochester Telephone Corp. v. United States* (1939) 307 U.S. 125, at p. 139.

⁶⁰ *National Broadcasting Co. v. United States* (1943) 319 U.S. 190, at p. 224. Cf. with *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223, at p. 228.

⁶¹ *Securities and Exchange Commission v. Chenery Corp.* (1943) 318 U.S. 80, at p. 94.

in the field of judicial review, 'it is generally agreed that the jurisdiction of superior courts should be invoked only on questions of law—a principle which is already familiar in other spheres, such as appeals to the Court of Criminal Appeal, and cases stated to the High Court by justices, and other authorities of inferior jurisdiction. To reopen all disputed issues of fact might lead to endless litigation, with no very satisfactory conclusion in the end'.⁶²

Yet, as the cases on both sides of the Atlantic show, the distinction between law and fact upon which the theory of review is based is not a mathematically exact one. Although the extent of review depends upon which side of the dividing line a given finding is seen to fall, definite criteria for ascertaining confidently, prior to court decision, on which side of the line a particular finding falls have not yet developed.⁶³ The distinction between law and fact 'is often not an illuminating test and is never self-executing'.⁶⁴

Perhaps the most significant development to note in the present Supreme Court's application of the law-fact criterion, for the purposes of determining the extent of judicial review, has been its tendency to abandon the so-called 'jurisdictional fact' doctrine. As has been indicated, the review power of the American courts has been limited to questions of law. Administrative findings of fact are not to be redetermined by the reviewing court. But what if the fact in question is a *jurisdictional* one, in the sense that its existence is a condition precedent to the lawful exercise of the administrative authority? To apply the theory of limited review to such cases would seem to run counter to the general policy of Anglo-American law, against allowing inferior tribunals finally to determine the limits of their own jurisdiction.

The application of the 'jurisdictional fact' doctrine in this country is best shown by *White and Collins v. Minister of Health*.⁶⁵ There, the Court of Appeal reversed a decision of Charles, J., refusing to set aside the confirmation of a compulsory purchase order by the Minister of Health.⁶⁶ The enabling legisla-

⁶² Allen, *Law and Orders* (1945), p. 159.

⁶³ *Report of the Attorney General's Committee*, p. 88.

⁶⁴ *Baumgartner v. United States* (1944) 322 U.S. 665, at p. 671.

⁶⁵ [1939] 2 K.B. 838.

⁶⁶ *Re Ripon Housing Order* [1939] 1 All E.R. 508.

tion⁶⁷ limited the administrative power in such a case to the acquisition of land which did not form part of any 'park, garden or pleasure ground'.

Luxmoore, L.J., who delivered the principal opinion, held that the administrative finding that the land in question did not come within the statutory exception was not conclusive upon the reviewing court. 'The first and most important question to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for unless the land can be held not to be part of a park . . . there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the court, which has to consider whether there is jurisdiction to make or confirm the order, must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the court would be illusory'.⁶⁸

The *White and Collins Case* is basically similar to *Crowell v. Benson*,⁶⁹ the leading American case applying the 'jurisdictional fact' doctrine. That case arose under the Longshoremen's and Harbor Workers' Compensation Act of 1927, which contains two fundamental limitations upon the right of compensation conferred by it. It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States', and it applies only when the relation of master and servant exists. The administrative findings of fact upon these two issues, the court said, cannot be vested with the same finality as ordinary factual determinations. These 'determinations of fact are fundamental or "jurisdictional"', in the sense that their existence is a condition precedent to the operation of the statutory scheme,⁷⁰ and the reviewing court may judge the issue of their validity upon its own independent judgment. The reasoning of the court here, it will be noted, is strikingly similar to that of Luxmoore, L.J., in the *White and Collins Case*.

The present Supreme Court, as has been mentioned, has indicated that it is wholly out of sympathy with attempts to secure broad review based upon the 'jurisdictional fact' doctrine.

⁶⁷ Housing Act, 1936, s. 75.

⁶⁸ [1939] 2 K.B., at p. 855.

⁶⁹ (1932) 285 U.S. 22.

⁷⁰ *Ibid.*, at p. 54.

That the court has, indeed, come close to abandoning the 'jurisdictional fact' doctrine is shown by a number of recent decisions.⁷¹ Perhaps the best known of these has been *National Labor Relations Board v. Hearst Publications*.⁷² That case arose under the National Labor Relations Act of 1935, whose operation is limited to cases where there exists an employer-employee relationship. The court held that the determination by the administrative agency concerned, regarding the existence of such relationship in the particular case, was to be given the same degree of conclusiveness as any other administrative finding of fact. This is true although the finding at issue was similar to that involved in *Crowell v. Benson*, in that the administrative power to act was dependent upon the existence of the relationship.

The court's view on this point was well expressed by Frankfurter, J., 'Analysis is not furthered by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in *Crowell v. Benson* . . . and the casuistries to which they have given rise, bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction'.⁷³

It seems clear from the above that the present Supreme Court has tended to narrow the scope of judicial review. At the same time enough has been said in other portions of this paper to indicate that, while this court is more friendly toward administrative authority than were its predecessors, it has far from surrendered the field to the administrator. In holding the exercise of administrative functions to the procedural level required by the demands of fair play, and in ensuring against arbitrary action by keeping access to the courts available, even though the scope of review is somewhat narrower than it was—the court has shown that it still has a vital role to play.

'How to fit ancient liberties, which have gained a new preciousness, into solution of those exigent and intricate economic

⁷¹ See Schwartz, *American Administrative Law* (1950), pp. 120–126.

⁷² (1944) 322 U.S. 111.

⁷³ *Yonkers v. United States* (1944) 320 U.S. 685, at p. 695.

problems that have been too long avoided rather than faced, is the special task of Administrative Law', wrote a member of the Supreme Court in 1941.⁷⁴ Few would deny that that task is still, in large measure, with us. For those of us in the common law world, indeed, the problem has become an even more difficult one. For we have come to realise that abdication of the field to the administrator will not lead to a solution. 'It will not do to say that it all must be left to the skill of experts'.⁷⁵ The judiciary, too, has a part to perform. 'Courts no less than administrative bodies', the Supreme Court stated significantly in a leading case, 'are agencies of government. Both are instruments for realising public purposes'.⁷⁶

⁷⁴ Frankfurter (1941) 41 *Columbia Law Review*, pp. 585, 586.

⁷⁵ *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U.S. 591, at p. 627.

⁷⁶ *Scripps-Howard Radio v. Federal Communications Commission* (1942) 316 U.S. 4, at p. 15.

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